

crowell-legal-analysis	3
tab-01	24
tab-02	34
tab-03	44
tab-04	78
tab-05	84
tab-06	101
tab-07	110
tab-08	134
tab-09	141
tab-10	148
tab-11	159
tab-12	172
tab-13	211
tab-14	237
tab-15	257
tab-16	266
tab-17	295
tab-18	320
tab-19	341
tab-20	352
tab-21	375
tab-22	383
tab-23	432
tab-24	457
tab-25	470
tab-26	487
tab-27	497
tab-28	506
tab-29	527

tab-30	542
tab-31	547
tab-32	555
tab-33	568
tab-34	594
tab-35	601
tab-36	626
tab-37	649
tab-38	659
tab-39	685
tab-40	691
tab-41	729
tab-42	733
tab-43	753
tab-44	766
tab-45	770
tab-46	789
tab-47	793
tab-48	802
tab-49	811
tab-50	829
tab-51	839
tab-52	860
tab-53	883
tab-54	894
tab-55	915

F. Ryan Keith
(202) 624-2904
frkeith@crowell.com

May 15, 2003

3350:frk
099401.001012

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT COMMUNICATION**

VIA HAND DELIVERY

Jeffrey Schmidt
3003 Van Ness Street, N.W., #W406
Washington, D.C. 20008

Re: Analysis of Potential Claims Against AIP

Dear Jeff:

On May 30, 2000, the American Institute of Physics (“AIP” or “the Institute”) terminated your employment after you had served for nineteen years on the staff of its professional magazine, *Physics Today*. By the terms of an engagement letter dated November 18, 2002, Crowell & Moring LLP agreed “to conduct research on viable legal claims, both on the administrative and court levels, that you might have against AIP arising out of your termination,” and to “draft a memorandum summarizing the results of its research evaluating potential claims.”

This letter, which memorializes the results of our research, and our review of the documents, materials, and other information you have provided, constitutes the memorandum contemplated by our engagement letter. The analysis provided herein is consistent with the conclusions that I have previously discussed with you in person.¹

¹ As you know, the engagement letter continued: “The Firm at this time has not agreed to represent you in any litigation or administrative advocacy concerning this matter. This means that we will not bring a lawsuit on your behalf to recover money from or compel certain actions by AIP or *Physics Today*.”

(continued...)

A. Introduction

Based on the facts that you have provided, AIP's termination of your employment raises substantial questions, in light of the surrounding circumstances, your consistently strong evaluations, and other documented praise for your work. Accordingly, we have carefully considered a number of potential causes of action against AIP. In particular, we believe that the following causes of action merit further consideration: (1) retaliatory discharge, in violation of Title VII of the Civil Rights Act of 1964; (2) breach of contract; (3) violations of the United States Constitution, under color of state law, pursuant to 42 U.S.C. § 1983; and (4) defamation. Each will be discussed in further detail below.

For purposes of this memorandum, we will assume that your core claim would be that AIP terminated your employment for reasons relating to some aspect of your workplace activism, and not for the narrow reason that AIP has identified – *i.e.*, writing your book *Disciplined Minds* “on stolen time” (or for saying that you did). Given the positions you have advanced before the Prince George's County Human Relations Commission (where a Title VII charge remains pending), the National Labor Relations Board, and the Maryland Department of Labor regarding the reasons for your termination, and given our various discussions on this subject, your workplace activism would appear to be the strongest starting point for any cause of action.²

(...continued)

To the extent you have raised the possibility of additional claims against the University of Maryland, I have indicated that such claims are (1) are beyond the scope of our engagement; and (2) are unlikely to succeed, based on the facts as we understand them.

² Of course, if you filed suit, you would be permitted to “plead in the alternative,” or assert legal theories that are inconsistent, or even contradictory, in a single complaint. Thus, you could certainly allege in the alternative that you were terminated for writing *Disciplined Minds*. That allegation would likely give rise to a single, relatively narrow potential claim: retaliation for engaging in free speech protected by the First Amendment. Any such claim would be valid only if a court were to construe AIP's termination of your employment as “state action.” As discussed elsewhere herein, we think that it is not likely that a court would reach such a conclusion. In addition, even were your discharge “state action,” the First Amendment does not protect retaliation for all speech, but only for speech regarding matters of “public concern.” *See, e.g., Peters v. Jenney*, 2003 U.S. App. LEXIS 7540,

(continued...)

We have likewise considered, but eventually were not persuaded by, other possible claims, including: (1) racial discrimination in contract, pursuant to 42 U.S.C. § 1981, because, *inter alia*, there is no basis for asserting that you were discriminated against on the basis of your own race, *see, e.g., Little v. United Techs., Inc.*, 103 F.3d 956, 961 (11th Cir. 1997); (2) any claim under the District of Columbia Human Rights Act, as the one-year statute of limitation expired in May 2001, *see* D.C. CODE § 2-1403.16; (3) claims for wrongful termination under either Maryland or District of Columbia law, for you have not claimed that your termination was in violation of clearly articulated public policies not otherwise protected by law, *see Wholey v. Sears, Roebuck & Co.*, 803 A.2d 482, 490 (Md. 2002); *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 35 (D.C. 1991) (wrongful discharge tort restricted to employees fired for refusal to violate statute or regulation); and (4) claims for invasion of privacy or emotional distress, as we see no indication that AIP's conduct rose to the level of "highly offensive" or "extreme and outrageous," the sort of conduct on which such claims must be premised, *see Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001) and *Chinwuba v. Larsen*, 790 A.2d 83, 102 n.8 (Md. Ct. Spec. App. 2002) (invasion of privacy); *Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 113 (Md. 2000) and *Avery v. HPCS, Inc.*, 818 A.2d 175, 177 (D.C. 2003) (intentional infliction of emotional distress).³

(...continued)

at *39 (4th Cir. Apr. 22, 2003). The subject matter of *Disciplined Minds* is probably not a matter of "public concern" within the legal meaning of that term. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (speech on "matters of public concern" "relate[s] to any matter of political, social, or other concern to the community"); *Strohman v. Colleton Co. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992) ("personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest" not "matters of public concern"). Even if the subject matter were a "matter of public concern," you would be required to prove that your interest in expression outweighed AIP's interest in "efficient operation of the workplace," as well as "but for" causation. *E.g., Peters*, 2003 U.S. App. LEXIS 7540, at *39-40; *Rush v. Rowan-Salisbury Board of Ed.*, 1997 U.S. App. LEXIS 29117, at *3-4 (4th Cir. Oct. 23, 1997); *see also DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995). Both of these elements create substantial hurdles, based on the facts as we understand them.

³ The workplace activity that you have described is, at least on its face, within the purview of the National Labor Relations Act ("NLRA"). As you have exhausted the available administrative procedures under that Act, however, this memorandum will not further address the viability of potential claims that statute
(continued...)

B. Analysis

1. Personal Jurisdiction and Choice of Law Issues

Before addressing the merits of the claims identified above, a few preliminary considerations bear mention. First is the distinction in the law between “personal jurisdiction” – *i.e.*, the fora where you may bring your claims – and “choice of law” – *i.e.*, what law will apply in whatever forum you ultimately choose. You have indicated that you would prefer to pursue legal claims in the District of Columbia; I have advised you that the existence of AIP’s small auxiliary office in the District may support the exercise of personal jurisdiction by District of Columbia courts. There is no question, however, that AIP is subject to the personal jurisdiction of the Maryland courts.⁴ Were you to elect to file an action against AIP in the District of Columbia, and a District of Columbia court were to dismiss that action solely for lack of jurisdiction, Maryland Circuit Court Rule 2-101(b) appears to allow for its refiling in Maryland within 30 days. There is a parallel rule in the Maryland District Courts. There is no such rule in the District of Columbia courts, or in the federal courts.

Second, wherever there is so-called “personal” jurisdiction over AIP, I have also described to you the possibility of “subject matter” jurisdiction in federal courts in those locations, if the lawsuit also has one of two characteristics: (a) there is “complete diversity” among the parties (which, unless AIP is organized under District of Columbia law, or there are other non-diverse parties in the lawsuit, there would be), and more than \$75,000 in controversy; or (b) the case “arises under” federal law, as would, for example, an action asserting a violation of Title VII. *See* 28 U.S.C. §§ 1331, 1332(a). I have also described how, even if you file a case in state

(...continued)

may provide. As the National Labor Relations Board has informed you, you may petition for the reconsideration of your charge “at any time,” based on the presentation of new evidence. I have advised you that a request to the Board, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, may be a possible source of “new evidence.”

⁴ Under the related principle of “venue,” based on the facts you have provided, your potential Title VII claim may be brought only in the state and federal “judicial districts” that include College Park, Maryland. *See* 42 U.S.C. § 2000e-5(f)(3).

court, AIP might subsequently “remove” the case to federal court if it believes that at least one of these characteristics is present. *See* 28 U.S.C. § 1441(a).⁵

Third, wherever the case is brought, “choice of law” questions will remain. You live in the District of Columbia, and, at the end of your employment with AIP, worked from your home there a few days per week. However, your employment relationship with AIP was clearly concentrated in Maryland: AIP was located in Maryland, AIP personnel determined the terms and conditions of your employment (including eventually deciding to fire you) in Maryland, and the discharge itself – the primary event of legal significance – occurred in AIP’s College Park offices. Accordingly, for claims arising out of your employment, or otherwise stemming from the conduct of AIP while you worked there, this memorandum will assume that Maryland law will apply. Similarly, for any federal law claims, the decisions of the United States Court of Appeals for the Fourth Circuit will apply, whenever there is not a decision of the United States Supreme Court that otherwise controls.⁶ As between Maryland and the District of Columbia, the statutes of limitation applicable to the potential claims analyzed herein are the same.

You, or other lawyers that represent you, may believe there are certain tactical or other considerations that favor a particular forum, or that there are reasons to argue that other law may apply in a case that you bring. Those considerations and reasons are beyond the scope of the instant assessment.

2. Claims Pursuant to Title VII

On November 22, 2000, you filed a charge with the Prince George’s County Human Relations Commission (cross-filed with the EEOC), alleging that your firing violated Title VII of the Civil Rights Act of 1964. In that charge, you stated your belief that your firing was “in retaliation for [your] complaints of disparate

⁵ You may pursue state law claims in federal court (subject to 28 U.S.C. §§ 1332(a) & 1367(a)), just as you may pursue federal claims in state court. Of note, the subject matter jurisdiction of Maryland District Courts in civil cases is limited to suits seeking \$25,000 or less in damages; conversely, invoking the subject matter jurisdiction of Maryland Circuit Courts requires that at least \$2,500 in damages be sought. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 4-401, 4-402; *see also* D.C. CODE § 11-921(a)(6) (subject to exclusive federal jurisdiction, subject matter jurisdiction of District of Columbia Superior Court is unrestricted).

⁶ When not to the contrary, illustrative authority from other jurisdictions may be cited or discussed.

treatment of employees (Black) not being hired in professional positions,” and thus protected by the “opposition clause” of 42 U.S.C. § 2000e-3(a). On June 13, 2002, the agency determined that there was “insufficient evidence” to support your allegations. The agency subsequently granted your request for reconsideration, and your charge has again been pending in the agency since that time.⁷

In this portion of our assessment, we will only discuss our views of the strengths and weaknesses of the Title VII claim submitted to the agency. As you know, you must receive a “right-to-sue” letter before asserting Title VII-based allegations against AIP in a court of law, although you may request that the agency issue that letter before the agency has completed its investigation. Once issued, if the EEOC will not pursue your claim itself, you have 90 days to file such a complaint in court. If filed after that date, a complaint raising a Title VII claim would be barred as untimely.

A claim of retaliation based on “opposition” to activity protected by Title VII requires three showings. First, you must demonstrate a *prima facie* case: (1) that you engaged in activity protected by the statute; (2) that a cognizable “adverse employment action” occurred within 300 days of the date of your charge; and (3) that there was a causal connection between the two. *See, e.g., Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001).

Based on the facts that you have provided, we believe that you can satisfy the first two of these requirements readily.⁸ However, the law governing “causal connections” will pose an obstacle to ultimately prevailing on this claim.

⁷ In response to your charge, the agency will also investigate whether AIP violated the parallel provisions of the Maryland Human Relations Act, MD. CODE ANN. art. 49B, § 14 *et seq.*

⁸ One caveat: the only “adverse employment action” that occurred within 300 days of your charge was your firing. Although the so-called “ban on private conversations” was also in place at that time, it was generally applicable, and not necessarily directed specifically at you. Accordingly, it appears that only the circumstances of your firing remain timely, although other potential adverse employment actions (*e.g.*, your negative performance review on August 17, 1999) outside that period could remain relevant as evidence of AIP’s discriminatory conduct. Of course, future adverse employment actions (*e.g.*, negative employment references) may support new charges if and when they occur.

Central to proving a causal connection is temporal proximity. In *Dowe v. Total Action Against Poverty*, 145 F.3d 653 (4th Cir. 1998), the Fourth Circuit ruled that “[a] lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action ... negates any inference that a causal connection exists between the two.” In some reported cases, courts have found that as little as one month is too long. *See, e.g., Nelson v. J.C. Penney Co.*, 75 F.3d 343 (8th Cir. 1995). According to the information that you have provided, the last incident of protected activity occurred no later than nine months in advance of your firing, and may have occurred as long as thirty months before.⁹ It is difficult to state with certainty the ultimate effect of these gaps, but they render proving a causal connection difficult.

Furthermore, the facts suggest that AIP’s unfavorable conduct toward you began before your first recorded incident of activity specifically protected by Title VII, which arguably supports the inference that any “retaliation” by AIP was prompted by something other than your protests of its use of race in employment decisions. Lastly, between the time your protected activity appears to have begun and the time of your termination, your file includes evidence of a handful of positive employment actions by AIP, including the approval of your request for part-time status in the fall of 1999, and “glowing” praise for your work (your words, according to the chronology you have prepared) only a month before you were discharged. These facts also mitigate against your ability to prove the requisite causal connection.

Having said that, a pattern of animosity by an employer can sometimes provide a sufficient basis for establishing a causal connection, despite a delay in the allegedly retaliatory act. *See, e.g., Harrison v. Metropolitan Gov’t of Nashville*, 80 F.3d 1107, 1119 (6th Cir. 1996) (when “the plaintiff’s activities were scrutinized more carefully than those of comparably situated employees, both black and white, and ... the defendants took every opportunity to make his life as an employee unpleasant,” plaintiff could establish *prima facie* case despite fifteen months between protected activity and alleged retaliation). Therefore, to the extent AIP repeatedly criticized you, or sought to deter certain behavior by you in the workplace, a court may find that such a pattern indicates that your firing was simply the “last straw” in ongoing retaliatory activity. Naturally, these issues will be a leading aspect of any discovery that you take against AIP in a Title VII action.

⁹ Your charge claims that the date of your latest complaint protected by Title VII is August 17, 1999. Apparently, however, the only such complaint documented is dated November 5, 1997.

If you do establish a causal connection, however, and thereby your prima facie case, you must still prove a substantive Title VII violation by a preponderance of the evidence. In our view, the foremost obstacle to this portion of your case will be the demanding requirement that you show “but for” causation – that is, that AIP would not have terminated your employment but for your protected conduct. *See, e.g., Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). Your file seems to concede that AIP did not fire you until it read about your statements in *Disciplined Minds*. If a trier of fact found that these statements were merely *part* of the reason AIP discharged you when it did, the “but for” test would not be met. *See id.*

In sum, we conclude that while you may be able to establish a prima facie case of retaliation under the opposition clause of Title VII, there would be substantial hurdles to clear in order to prevail on the merits.

3. Breach of Contract

As we have discussed, we believe a breach of contract claim on the facts that you have provided is suspect, and that a court would likely seriously entertain a motion to dismiss such a claim, for at least two reasons: (1) under Maryland law, the “employment at will” doctrine remains robust; and (2) the at-will disclaimers contained in AIP’s employee handbook would likely be enforced, and would likely override any alleged modifications to your employment relationship with AIP.

It is well-established in Maryland that employment is presumptively “at-will,” meaning that either party may terminate the employment relationship at any time, for any reason or for no reason. *See, e.g., University of Baltimore v. Iz*, 716 A.2d 1107 (Md. 1998); *Suburban Hosp., Inc. v. Dwiggins*, 596 A.2d 1069 (Md. 1991); *Adler v. American Std. Corp.*, 432 A.2d 464 (Md. 1981); *see also Page v. Carolina Coach Co.*, 667 F.2d 1156, 1158 (4th Cir. 1982).

There is no formal employment contract between you and AIP modifying the at-will relationship. Moreover, AIP policies, including the employee handbook that was regularly distributed throughout the Institute, and which you received each time, expressly state that employment with AIP is at-will, and that it may be terminated in accordance with the presumptions of Maryland law.

Most significantly for this analysis, in May 1996, AIP issued an employee handbook containing the following “at-will disclaimer”:

neither the Handbook’s policies nor any other
representations made by a management representative,
at the time of hire or at any time during employment, are

to be interpreted as a contract between the Institute and any of its employees.

AIP apparently released the next version of its handbook in June 1999, and it includes a disclaimer with materially identical language.¹⁰ Based on our understanding of the facts, and existing legal precedent, these at-will disclaimers would likely be enforced, even in the face of certain written statements that you believe may have altered the employment relationship. In particular, you point to an e-mail from Stephen Benka, dated November 17, 1996, which states, in relevant part:

Nobody's job will be jeopardized by speaking freely and airing their views on matters pertinent to the magazine. ... There are, however, no guarantees of lifetime employment at AIP for any of us, from the Publisher on down (and up). We all have jobs to do, and we must do them well. Basing job security on job performance is sound. That won't change.

Although Mr. Benka is making representations to the *Physics Today* staff, it is unlikely under the law that these statements have the force and effect of a contract (*i.e.*, an obligation to refrain from terminating your employment on any basis other than performance), especially given the contractual disclaimers cited above. *See, e.g., Fournier v. United States Fidelity & Guaranty Co.*, 569 A.2d 1299, 1303-04 (Md. Ct. Spec. App. 1990). Such disclaimers are generally intended to foreclose the possibility that statements like Mr. Benka's will give rise to contractual obligations. *See, e.g., Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 794 (Md. Ct. Spec. App. 1986) (“[j]ustifiable reliance is precluded where ... contractual intent has been expressly disclaimed” (citing cases)) (quoted in *Fournier*, 569 A.2d at 1303-04).

Any claim that the AIP Handbook did not apply and/or was not enforced at *Physics Today* is likely meritless. On its face, the Handbook does not exclude from

¹⁰ Interestingly, the other copies of AIP employment handbooks that you provided show that this language was modified over time. In January 1982, the handbook did not include a disclaimer at all; in September 1988, a disclaimer appeared, stating that “neither this handbook nor any other communication by a management representative is intended to create, in any way a contract of employment”; in March 1990, the disclaimer dropped that language, but the provision reappeared in May 1996.

its purview *Physics Today* or any other division of AIP, making that issue highly fact-bound, and likely very difficult to prove in accordance with the requisite burden. Furthermore, this fact may be inconsequential, as the Handbook itself disavows imposing contractual duties on either AIP or its employees. Only the disclaimer purports to be a contract, and, at bottom, only the disclaimer is germane to this analysis. Indeed, Maryland courts hold that “it is not necessary that an employee actually read a disclaimer in order for it to be valid.” *Elliott v. Board of Trustees*, 655 A.2d 46, 51 (Md. Ct. Spec. App. 1995).

Second, the potential terms of any contract that Mr. Benka’s e-mail may have created are dissimilar to the precise obligation to which you have stated AIP agreed.¹¹ Over the course of our discussions, you have suggested that the e-mail indefinitely forfeited AIP’s right to fire its employees for “all reasons other than job performance.” We do not believe a court would be inclined to endorse such an expansive view of the contract’s terms.¹²

¹¹ The best evidence of a contract’s meaning is typically its plain terms. Mr. Benka’s e-mail states that “[b]asing job security on job performance is sound” (emphasis added). Such a statement does not indicate that “job performance” would be the *only* factor in determining “job security” at AIP. Rather, if job performance triggered a more comprehensive review, and was ultimately rendered only a minor reason for the termination of a particular individual’s employment, that would be consistent with Mr. Benka’s statement as well. In addition, we would expect AIP to argue that Mr. Benka’s e-mail “expresses a mere hope or expectation,” insufficient to have modified the at-will relationship. See *Hillsman v. Sutter Community Hospitals*, 1984 Cal. App. LEXIS 1821, at *7 (Cal. Ct. App. Mar. 27, 1984) (employer statement that it “look[ed] forward to a long, pleasant, and mutually satisfactory relationship” did not modify at-will relationship).

¹² In our view, a claim that the e-mail quoted above contractually prohibited AIP from terminating your employment based on an exercise of “free expression” in the workplace, and that AIP subsequently breached that contract, is not likely to succeed. In addition to arguing that the handbook’s disclaimer preserved the employment at-will relationship, AIP would probably argue that it terminated you not for your exercise of free expression at the workplace, but for writing *Disciplined Minds* on “time” that was “stolen” from AIP, for disparaging AIP in *Disciplined Minds*’s pages, and/or for being disruptive in the workplace. Said differently, even if a court were convinced that the e-mail from Mr. Benka created such a contract, AIP would have substantial arguments that it did not violate that contract by

(continued...)

Third, even if Mr. Benka's e-mail created a contract, regardless of its terms, AIP is likely to assert that the June 1999 Employee Handbook – specifically, the disclaimer cited above – terminated that contract, and restored all employment relationships to at-will.¹³

Overcoming the presumption of at-will employment, in the absence of a contract, is very difficult. Proving a contract will require that you establish, by a preponderance of the evidence, a “meeting of the minds” on all material terms of the contract you claim was in existence, a degree of “definiteness” to those terms, and the exchange of legal “consideration” for them. On the facts that you have provided, we believe that a claim for breach of contract against AIP is not likely to succeed.

4. Claims Based on 42 U.S.C. § 1983

If AIP, acting under color of state law, abridged or violated rights guaranteed to you by the United States Constitution (or, in some circumstances inapplicable here, other federal laws), this statute would provide a cause of action against AIP for that conduct. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999). Because this statute (as well as the Constitution itself) applies only to “state action,” demonstrating that AIP’s

(...continued)

terminating your employment following the publication of a book that you stated was written “on stolen time,” and that arguably disparages AIP.

If confronted with an argument that AIP discharged you for “cause,” you might respond with the finding of the Maryland Department of Labor (*i.e.*, that AIP did not terminate your employment on the basis of “misconduct”). However, courts are unlikely to give that determination preclusive effect, and may not permit it to be admitted into evidence, given the different standards that apply to unemployment compensation determinations.

¹³ You have highlighted a second document on this point, a September 14, 1999 memorandum from Mr. Benka to you, granting your request for part-time status, and approved by the signature of James H. Stith. Assuming *arguendo* that this memorandum is “an agreement, in writing ... and signed by [an] Institute official” (according to the June 1999 handbook, the only sort of document capable of “modifying th[e] relationship” of at-will employment at AIP), the terms of the memorandum have no bearing on how or why AIP could lawfully terminate your employment. Rather, they merely indicate that you began to work part-time, in exchange for a proportionate reduction in your salary.

termination of your employment was state action is a critical threshold question. *See, e.g., UAW v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (“in a § 1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement ... are identical”); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

You have indicated that AIP is an “affiliate” of the University of Maryland, itself unquestionably a state actor. AIP moved to College Park from New York in 1993, and the draft affiliation agreement that you have provided, dated November 17 of that year, indicates that “[t]he prospect of synergy between the [University] Physics Department and [AIP] was, after all, an important factor in the decision to locate [AIP] in Maryland.” Pursuant to this agreement, and from what I understand from you, AIP employees receive staff identification cards, granting them the access to University facilities and events that employees of the University itself enjoy. The University bus also stops at the AIP offices (although they are not located on campus), and AIP employees may use the bus system, unlike the public at-large. You have stated that the University extends these benefits to individuals who its affiliates identify as employees, and terminates them when informed by the affiliate that an employment relationship has ended. You have stated that other University “affiliates” include Riggs Bank and the federal Department of Agriculture.

Although substantial, we do not believe these various connections are sufficient to convert your termination by AIP into state action under the law. This doctrine is fairly complex, and often subjective, but is currently summarized by a two-part test. Applying this test, formulated in the decision of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-22 (1991), courts first determine “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority,” and, second, assess “whether the private party charged with the deprivation could be described in all fairness as a state actor.”

The second of these factors is generally more significant, and, in at least two decisions, the United States Supreme Court has determined that they are insufficient to convert otherwise private conduct into state action, when the state arguably ratifies private conduct in the application of a neutral policy or law. That appears to invalidate the potential theory in your case, which would contend that action taken by the University of Maryland (*i.e.*, revoking the benefits it extended to you as an affiliate’s employee) in response to your firing by AIP converts that firing into state action. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In our view, without evidence that

the University directed or benefited from your firing, the University's response does not render AIP's conduct "state action."

Given this assessment of the threshold state action element, we are doubtful that any § 1983 claim against AIP will succeed. Assuming *arguendo* that you could establish state action in your termination, the facts as we understand them suggest two potential constitutional violations: (1) that your termination without a hearing has deprived you of due process of law, and (2) that you were retaliated against for exercising First Amendment rights.

The first of these theories, however, depends upon the existence of a contract, as the law does not recognize a property interest protected by the Fourteenth Amendment in at-will employment. See, e.g., *Bowers v. Town of Smithsburg*, 1999 U.S. App. LEXIS 1648, at *5 (4th Cir. Feb. 5, 1999); see also *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Likewise, the second, as mentioned in footnote 2, requires both (a) reliance upon a theory fundamentally inconsistent with those you have asserted to date, and (b) that the speech allegedly prompting the retaliation (*i.e.*, the writing of *Disciplined Minds*) is protected by the First Amendment at all.

For the reasons stated, we believe that neither of these claims presents a strong likelihood of success.

5. Claims for Defamation

The final claim we believe merits consideration is common law defamation, based on statements that AIP personnel may have made about you since your termination. Under both District of Columbia and Maryland law, claims for defamation must be filed within one year of the date of the publication of the allegedly defamatory statement. See D.C. CODE § 12-301(4); MD. CODE ANN., CTS. & JUD. PROC. § 5-105. In actions for defamation, the law of the jurisdiction(s) where the statement is made, or, if different, where the statement causes the plaintiff harm, may potentially apply.

Defamation claims are often difficult to prove, and infrequently support substantial damage awards. Yet the law does not confer a right to defame others, and so such claims, subject to the types of concerns discussed herein, should not be ruled out.

Under Maryland law, a claim for defamation requires proof of the following elements: (1) a defamatory statement, or "one which tends to expose a person to

public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person”; (2) falsity, or that the statement is “not substantially correct”; (3) fault; and (4) injury. *E.g.*, *Chesapeake Publishing Co. v. Williams*, 661 A.2d 1169, 1174 (Md. 1995); *Shapiro v. Massengill*, 1995 Md. App. LEXIS 105, at *40 (Md. Ct. Spec. App. June 1, 1995).¹⁴ District of Columbia law is materially the same. *See Carter v. Hahn*, 2003 D.C. App. LEXIS 219, *6 (D.C. Apr. 17, 2003) (citations omitted); *see also Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (“In the District of Columbia, a statement is defamatory if it tends to injure [the] plaintiff in his [or her] trade, profession or community standing or lower him in the estimation of the community”); *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000). In both jurisdictions, unprivileged statements of opinion are generally not actionable, except when they “imply an assertion of objective fact.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990).

Traditionally, the category of “libel per se” includes, *inter alia*, written statements that are:

spoken of a person in his office, trade, profession, business or means of getting a livelihood, ... [and] which charge him with fraud, indirect dealings or incapacity and thereby tend to injure him in his trade, profession or business.

Kilgour v. Evening Star Newspaper Co., 53 A. 716, 717 (Md. 1902). Statements that charge the subject with a crime are also among those considered “libel per se.” *See Shockey v. McCauley*, 61 A. 583 (Md. 1905); *Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 698 (D.C. 1970). As a result, such statements are thus actionable without the need for pleading of “innuendo and colloquium,” demonstrating the defamatory content, or for proof of “special damages,” actual pecuniary loss that results from the statements at issue. *See Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1119 (Md. 1979).

¹⁴ In response to a claim for defamation, AIP might allege that you are a “public figure,” and therefore must prove the additional element of “actual malice.” *See New York Times v. Sullivan*, 376 U.S. 254, 279-90 (1964); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (actual malice requirement applies only to statements involving matters of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defining limited purpose public figures).

Later Maryland decisions have made clear that the recovery of more than nominal damages, even in a “libel per se” case, does require a showing that the defamatory statement caused the plaintiff’s reputation some harm, and that the amount of damages available should be limited to the extent of that harm. *See IBEW, Local 105 v. Mayo*, 370 A.2d 130, 135 (Md. 1977) (“damage ... [must] flow from the proven damage to reputation). Damages for defamation cannot be presumed. *See Hillman*, 400 A.2d at 1119; *see also The Hearst Corp. v. Hughes*, 466 A.2d 486 (Md. 1983). Punitive damages are not allowed. *See Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (Md. 1976). Under the law of the District of Columbia, while damages are also tied to the extent of injury to the plaintiff’s reputation, punitive damages may be recovered when “actual malice” is proved by clear and convincing evidence. *See Ayala v. Washington*, 679 A.2d 1057, 1068-1070 (D.C. 1996).¹⁵

As potentially defamatory statements, you have provided us copies of two e-mail messages from Marc H. Brodsky, AIP’s Executive Director, both dated earlier this year.¹⁶ In both messages, however, Mr. Brodsky is arguably only repeating or paraphrasing your own statements from *Disciplined Minds* (i.e., that the book was written on “stolen time”), and apparently is transmitting those messages only to a single individual, who initiated the contact to support your reinstatement. Such a case may involve “libel per se” under applicable law. But where the allegedly defamatory statement was originally made by the plaintiff himself; where the scope

¹⁵ Subject to the great difficulty of proving state action on these facts, if false statements were the basis for AIP’s termination of your employment, those statements might support a separate § 1983 action based on deprivation of your liberty interest. This claim would not depend on the existence of a contract, but would require showings that (1) AIP “has published false statements” about you; (2) that “th[o]se untruths are preventing [you] from securing similar employment”; and (3) that the false information in question “was of such a stigmatizing nature that it virtually foreclosed [your] freedom to take advantage of other employment opportunities.” *Leese v. Baltimore County*, 497 A.2d 159, 169 (Md. App. 1985). In addition, success on the claim apparently would provide you only “an opportunity to refute the charge,” or “to clear [your] name.” *Roth*, 408 U.S. at 573 & n.12; *see also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

¹⁶ In any such lawsuit for defamation, an initial consideration will be identifying the proper defendant. You will want to consider whether Mr. Brodsky made any statement “within the scope of his employment,” which, under the legal doctrine of *respondeat superior*, will determine whether the statement is properly attributed to Mr. Brodsky individually, or instead to AIP.

of the intended publication is relatively limited; and where the person(s) receiving the statement defend the plaintiff, and are likely already to know the plaintiff's and defendant's respective version of events, we believe that prevailing in an action for defamation would be a challenge.

C. Conclusion

As you continue weighing possible remedies for the termination of your employment at AIP, we hope that you find this assessment useful. We have very much enjoyed serving you in this capacity, and regret that our view of existing law, as applied to the facts you have provided, does not justify further commitment of the Firm's limited resources for *pro bono* representation to your case. While we will welcome questions about this memorandum (including meeting with you at the Firm), this letter will discharge the terms of your current engagement of Crowell & Moring LLP.

However, as we have discussed, this document, as well as its contents and all other aspects of our representation of you, will remain protected by the attorney-client privilege,¹⁷ and will not be disclosed by us without your advance authorization. In addition, because you hold the privilege, we caution you that you are also capable of waiving it, even when you may not intend to do so. If you are considering disclosing the contents of this memorandum or other aspects of our representation to third parties, under circumstances that are not themselves protected by law, we recommend that you first seek legal advice as to the effect of that disclosure on your privilege.


As we have discussed several times, the applicable statutes of limitation for your possible claims for breach of contract and any violation of 42 U.S.C. § 1983 expire on May 30, 2003. *See* D.C. CODE § 12-301(8); MD. CODE ANN., CTS. & JUD. PROC. § 5-101. That means that any complaint alleging these causes of action must be filed with an appropriate court on or before that date. As a result, if you remain interested in making those claims in court, you should act promptly to preserve your rights. Court rules do not require that you have legal representation to file a complaint.

¹⁷ This document is also subject to the legal privilege for attorney work product. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *see also* FED. R. CIV. P. 26(b)(3).

Jeffrey Schmidt
May 15, 2003
Page 17

We wish you the best, and sincerely hope that you will keep in touch.

Warmest regards,



F. Ryan Keith

Attachment (Table of Cited Cases)

cc: Kris D. Meade, Esq.
Susan M. Hoffman, Esq.

2040002v4

TABLE OF CITED CASES

Tab

<i>Adams v. George W. Cochran & Co.,</i> 597 A.2d 28 (D.C. 1991)	1
<i>Adler v. American Std. Corp.,</i> 432 A.2d 464 (Md. 1981)	2
<i>Albright v. Oliver,</i> 510 U.S. 266 (1994)	3
<i>Avery v. HPCS, Inc.,</i> 818 A.2d 175 (D.C. 2003)	4
<i>Ayala v. Washington,</i> 679 A.2d 1057 (D.C. 1996)	5
<i>Beeton v. District of Columbia,</i> 779 A.2d 918 (D.C. 2001)	6
<i>Board of Regents v. Roth,</i> 408 U.S. 564 (1972)	7
<i>Bowers v. Town of Smithsburg,</i> 1999 U.S. App. LEXIS 1648 (4th Cir. Feb. 5, 1999)	8
<i>Carter v. Hahn,</i> 2003 D.C. App. LEXIS 219 (D.C. Apr. 17, 2003).....	9
<i>Castiglione v. Johns Hopkins Hosp.,</i> 517 A.2d 786 (Md. Ct. Spec. App. 1986)	10
<i>Chesapeake Publishing Co. v. Williams,</i> 661 A.2d 1169 (Md. 1995)	11
<i>Chinwuba v. Larsen,</i> 790 A.2d 83 (Md. Ct. Spec. App. 2002)	12
<i>Connick v. Myers,</i> 461 U.S. 138 (1983)	13

<i>DiMeglio v. Haines</i> , 45 F.3d 790 (4th Cir. 1995)	14
<i>Dowe v. Total Action Against Poverty</i> , 145 F.3d 653 (4th Cir. 1998)	15
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	16
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991)	17
<i>Edwards v. City of Goldsboro</i> , 178 F.3d 231 (4th Cir. 1999)	18
<i>Elliott v. Board of Trustees</i> , 655 A.2d 46 (Md. Ct. Spec. App. 1995)	19
<i>Flagg Bros., Inc. v. Brooks</i> , 436 U.S. 149 (1978)	20
<i>Fournier v. United States Fidelity & Guaranty Co.</i> , 569 A.2d 1299 (Md. Ct. Spec. App. 1990)	21
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	22
<i>Guilford Transp. Indus. v. Wilner</i> , 760 A.2d 580 (D.C. 2000)	23
<i>Harrison v. Metropolitan Gov't of Nashville</i> , 80 F.3d 1107 (6th Cir. 1996)	24
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947)	25
<i>Hillsman v. Sutter Community Hospitals</i> , 1984 Cal. App. LEXIS 1821 (Cal. Ct. App. Mar. 27, 1984)	26
<i>IBEW, Local 105 v. Mayo</i> , 370 A.2d 130 (Md. 1977)	27
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	28

<i>Jacron Sales Co. v. Sindorf</i> , 350 A.2d 688 (Md. 1976)	29
<i>Johnson v. Johnson Publishing Co.</i> , 271 A.2d 696 (D.C. 1970)	30
<i>Kilgour v. Evening Star Newspaper Co.</i> , 53 A. 716 (Md. 1902)	31
<i>Klayman v. Segal</i> , 783 A.2d 607 (D.C. 2001)	32
<i>Leese v. Baltimore County</i> , 497 A.2d 159 (Md. App. 1985).....	33
<i>Little v. United Techs., Inc.</i> , 103 F.3d 956 (11th Cir. 1997)	34
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922 (1982)	35
<i>Manikhi v. Mass Transit Admin.</i> , 758 A.2d 95 (Md. 2000)	36
<i>Metromedia, Inc. v. Hillman</i> , 400 A.2d 1117 (Md. 1979)	37
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990)	38
<i>Nelson v. J.C. Penney Co.</i> , 75 F.3d 343 (8th Cir. 1995)	39
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	40
<i>Page v. Carolina Coach Co.</i> , 667 F.2d 1156 (4th Cir. 1982)	41
<i>Peters v. Jenney</i> , 2003 U.S. App. LEXIS 7540 (4th Cir. Apr. 22, 2003)	42
<i>Ross v. Communications Satellite Corp.</i> , 759 F.2d 355 (4th Cir. 1985)	43

<i>Rush v. Rowan-Salisbury Board of Ed.</i> , 1997 U.S. App. LEXIS 29117 (4th Cir. Oct. 23, 1997)	44
<i>Shapiro v. Massengill</i> , 1995 Md. App. LEXIS 105 (Md. Ct. Spec. App. June 1, 1995)	45
<i>Shockey v. McCauley</i> , 61 A. 583 (Md. 1905)	46
<i>Strohman v. Colleton Co. Sch. Dist.</i> , 981 F.2d 152 (4th Cir. 1992)	47
<i>Suburban Hosp., Inc. v. Dwiggins</i> , 596 A.2d 1069 (Md. 1991)	48
<i>The Hearst Corp. v. Hughes</i> , 466 A.2d 486 (Md. 1983)	49
<i>UAW v. Gaston Festivals, Inc.</i> , 43 F.3d 902 (4th Cir. 1995)	50
<i>United States v. Price</i> , 383 U.S. 787 (1966)	51
<i>University of Baltimore v. Iz</i> , 716 A.2d 1107 (Md. 1998)	52
<i>Von Gunten v. Maryland</i> , 243 F.3d 858 (4th Cir. 2001)	53
<i>Wholey v. Sears, Roebuck & Co.</i> , 803 A.2d 482 (Md. 2002)	54
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	55

ROBERT L. ADAMS, APPELLANT, v. GEORGE W. COCHRAN & COMPANY, INC., APPELLEE
No. 89-374

District of Columbia Court of Appeals

597 A.2d 28; 1991 D.C. App. LEXIS 258; 6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

October 30, 1990, Argued
September 17, 1991, Decided

PRIOR HISTORY:

[**1] Appeal from the Superior Court of the District of Columbia; Hon. A. Franklin Burgess, Jr., Motions Judge, Hon. Joseph M. Hannon, Trial Judge.

DISPOSITION: Affirmed in part, reversed in part, and remanded for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former employee sought review of three pre-trial orders from the Superior Court of the District of Columbia, one that granted appellee former employer summary judgment on the issue of liability for emotional distress and two that denied the former employee leave to amend his complaint in an action for wrongful discharge.

OVERVIEW: The former employee brought an action against his former employer for wrongful discharge after the former employer fired him for refusing to drive a truck that lacked a required inspection sticker. The former employee sought lost wages and damages for emotional distress. The former employer moved for summary judgment, which the trial court granted in part, ruling that the former employee could not recover any damages for emotional distress. The former employee then filed two successive motions for leave to amend his complaint in order to add a claim for punitive damages, but both motions were denied. The case later went to trial, and the jury returned a verdict in favor of the former employee awarding him lost wages. The former employee appealed challenging the trial court's three pre-trial orders. The court affirmed in part, reversed in part, and remanded for further proceedings. The court concluded that the trial court erred in granting the former employer summary judgment on the issue of emotional damages. The court held that the former employee was to be given an opportunity to prove whether he suffered emotional distress, as he alleged in his complaint.

OUTCOME: The court affirmed the trial court's two pre-trial orders that denied the former employee leave to amend his complaint. The court reversed the grant of summary judgment in favor of the former employer on the issue of emotional damages and remanded for a new trial on that issue.

CORE TERMS: wrongful discharge, emotional distress, at-will, fired, summary judgment, public policy, cause of action, public policy exception, punitive damages, violation of public policy, inspection, sticker, truck, wages, former employer, regulation, discharged, mental anguish, intentional tort, sole reason, illegal act, discharging, statutorily, retaliation, perjury, wrongfully discharged, driving, adding, compensatory damages, municipal regulation

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN1] An employer may discharge an at-will employee at any time and for any reason, or for no reason at all.

597 A.2d 28, *, 1991 D.C. App. LEXIS 258, **;
6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

Torts: Business & Employment Torts: Wrongful Termination

[HN2] It seems to be universally accepted that an employer's discharge of an employee for the employee's refusal to violate a statute is a wrongful discharge in violation of public policy. An employer cannot be allowed to require his or her employees to break the law as a condition of continued employment.

Torts: Business & Employment Torts: Wrongful Termination

[HN3] An action for wrongful discharge in violation of public policy is an action in tort, rather than in contract. Liability is grounded in the principle that the employer may not retaliate against an employee by discharging that employee for refusing to break the law. The employer engages in tortious conduct by affirmatively forcing the employee to choose between breaking the law and keeping his job. The wrongful discharge of an at-will employee in violation of public policy is thus an intentional tort.

Labor & Employment Law: Employment Relationships: At-Will Employment

Torts: Business & Employment Torts: Wrongful Termination

Torts: Damages: Damages Generally

[HN4] There is a very narrow exception to the at-will doctrine under which a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee's refusal to violate the law, as expressed in a statute or municipal regulation. The burden of proving by a preponderance of the evidence that this was the sole reason shall be on the fired employee. The cause of action sounds in tort, and the tort is intentional. It allows for the full range of remedies to discourage employers from such conduct. Those remedies should include compensatory damages not only for lost wages and other financial benefits, such as health insurance and retirement payments, but also for any emotional distress or mental anguish that the employee may suffer as a result of the wrongful discharge.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN5] To recover damages for the tort of intentional infliction of emotional distress, the plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.

Civil Procedure: Pleading & Practice: Pleadings: Amended Pleadings

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

[HN6] D.C. Super. Ct. R. Civ. P. 15 provides that leave to amend shall be freely given when justice so requires, the District of Columbia Court of Appeals has held that an order denying leave to amend under Rule 15 will not be reversed unless the court is convinced that the trial court abused its discretion.

COUNSEL: H. Vincent McKnight for appellant.

Roy L. Kaufman, with whom Seth B. Popkin was on the brief, for appellee.

JUDGES: Terry and Farrell, Associate Judges, and Newman, Senior Judge. * Opinion for the court by Associate Judge Terry. Concurring opinion by Senior Judge Newman.

* Judge Newman was an Associate Judge of the court at the time of argument. He was commissioned as a Senior Judge on March 11, 1991.

OPINIONBY: TERRY

OPINION: [*29] Appellant Adams sued George W. Cochran & Company ("Cochran"), his former employer, for wrongful discharge after Cochran had fired him for refusing to drive a truck that lacked a required inspection sticker. Adams sought lost wages and damages for emotional distress. When Cochran moved for summary judgment, the court granted the motion in part, ruling, without further explanation, that Adams could not recover any damages for emotional distress. Adams then filed two successive motions for leave to amend his complaint in order to add a claim for punitive damages. Both motions[*2] were denied. The case later went to trial, and the jury returned a verdict in favor of Adams,

awarding him \$7094.00 in lost wages. On this appeal Adams challenges the three pre-trial orders: the one granting Cochran summary judgment on the issue of liability for emotional distress and the two denying Adams leave to amend his complaint. We affirm the latter two orders, but we conclude that the court erred in granting Cochran summary judgment on the issue of emotional damages. We therefore reverse and remand for a new trial on that issue.

I. FACTS

Cochran fired Adams from his job as a delivery truck driver. Adams thereafter filed this action, alleging that Cochran had wrongfully discharged him after he had refused to drive a truck that did not have an inspection sticker on its windshield. Adams alleged that Cochran's actions violated public policy in that Cochran had fired him for his refusal to violate District [*30] of Columbia law. n1 He sought damages for lost wages and for emotional distress.

-----Footnotes-----

n1 It is illegal to operate a motor vehicle in the District of Columbia without a current inspection sticker. 18 DCMR § 602.4 (1987). The trial court dismissed, as not supported by the evidence, Adams' claims that the truck was also in violation of other provisions of the motor vehicle regulations. Adams does not challenge that ruling on appeal.

-----End Footnotes-----

[**3]

Cochran answered the complaint and then moved for summary judgment on the ground that Adams was an at-will employee and therefore not entitled to damages, either for wrongful discharge or for emotional distress. Cochran argued that Adams had not alleged any breach of an employment contract and that District of Columbia law does not recognize the tort of wrongful discharge of an at-will employee. It also contended that Adams was not entitled to damages for emotional distress, either as an element of his claim for wrongful discharge or as a separate cause of action. The court denied Cochran's motion for summary judgment on the claim of wrongful discharge, n2 but granted it with respect to Adams' request for damages for emotional distress. The court's order, however, did not specify whether Adams was barred from recovering such damages for emotional distress as an element of wrongful discharge or as a separate cause of action, or both.

-----Footnotes-----

n2 Cochran does not contest this ruling. For purposes of this appeal, Cochran concedes that it fired Adams for his refusal to break the law by driving the truck without an inspection sticker.

-----End Footnotes-----

[**4]

Adams then filed a motion, pursuant to Super. Ct. Civ. R. 15, for leave to amend his complaint by adding a claim for punitive damages. That motion was denied on the ground that the proposed amendment sought damages for emotional distress, which was precluded by the court's earlier order. A second motion to amend the complaint for the same purpose was denied without opinion.

At trial Cochran defended against Adams' claim by introducing evidence that Adams was fired because he had become a difficult employee and had refused to take delivery runs on prior occasions without good reason. The case went to the jury, however, on the theory that Adams had been discharged solely for his refusal to violate District of Columbia law by driving a truck that lacked an inspection sticker. The court also instructed the jury that it could not award any more than Adams' lost wages, which the evidence showed was \$7094.00. The jury returned a verdict in favor of Adams in that amount.

II. WRONGFUL DISCHARGE

597 A.2d 28, *; 1991 D.C. App. LEXIS 258, **;
6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

A. The law in the District of Columbia

It has long been settled in the District of Columbia that [HN1] an employer may discharge an at-will employee at any time and for any reason, or for no reason at all. [**5] *Wemhoff v. Investors Management Corp.*, 528 A.2d 1205, 1208 n.3 (D.C. 1987); *Taylor v. Greenway Restaurant, Inc.*, 173 A.2d 211 (D.C. 1961); *Pfeffer v. Ernst*, 82 A.2d 763, 764 (D.C. 1951) (citing cases). It is undisputed that Adams' employment with Cochran was at will. Adams asks us to recognize a public policy exception to this at-will doctrine and to hold, for the first time, that an employer engages in tortious conduct when it fires an at-will employee for that employee's refusal to break the law at the employer's direction.

"Public policy" exceptions to the general rule have been urged upon this court before, but thus far we have not recognized any such exceptions. See *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981). As published, *Ivy* was not a decision on the merits but merely an order denying a petition for rehearing en banc in a case which had been decided by an unpublished Memorandum Opinion and Judgment. Four judges dissented from the denial of rehearing en banc, maintaining that this court should address the legality of terminating an at-will employee in violation of a "statutorily declared public policy." [**6]n3 [*31] *Id.* at 833 (Ferren, J., dissenting). n4

-----Footnotes-----

n3 The plaintiff in *Ivy* had alleged that he was fired in retaliation for his testimony, adverse to his employer, before an administrative agency investigating employment practices by that employer. 428 A.2d at 832.

n4 The fact that the published opinion in *Ivy* is only a dissent from the denial of rehearing en banc has not prevented other courts from citing that dissent for the proposition that the District of Columbia does (or would) recognize the tort of wrongful discharge in violation of public policy, see, e.g., *Alder v. Columbia Historical Society*, 690 F. Supp. 9, 16-17 (D.D.C. 1988); *Newman v. Legal Services Corp.*, 628 F. Supp. 535, 538 (D.D.C. 1986), as well as for the proposition that the District of Columbia does not, see *Hall v. Ford*, 272 U.S. App. D.C. 301, 313, 856 F.2d 255, 267 (1988).

-----End Footnotes-----

More recently we revisited the issue in *Sorrells v. Garfinckel's, Brooks Brothers, Miller & Rhoads, Inc.*, 565 A.2d 285 (D.C. 1989). [**7] The plaintiff in that case was an at-will employee who, after being fired, sued her former employer for wrongful discharge, alleging that her discharge had been contrary to District of Columbia public policy. The trial court granted the employer summary judgment on the issue of wrongful discharge. The plaintiff appealed to this court, arguing inter alia that her discharge violated the policy behind the District of Columbia Human Rights Act, D.C. Code §§ 1-2511 et seq. (1987 & 1990 Supp.). She did not allege an actual violation of the Act, however, but instead urged us "to 'broaden' the policies expressed in the Human Rights Act and to fill a perceived 'gap' in the Act." 565 A.2d at 289. This court, ruling that "no 'statutorily declared public policy' supports appellant's claim of wrongful discharge in this case," declined to hold that the plaintiff's discharge was in violation of public policy. *Id.* (citation omitted). In so ruling, we were careful to point out that we have never recognized a public policy exception to the at-will employment doctrine. *Id.*

Cochran argues that the public policy issue raised by Adams is not properly before this court and is, in any event, [**8] irrelevant. It maintains that the sole issue on appeal is the correctness of the award of damages, and that in order to resolve that issue, we need not decide whether to recognize an exception to the rule that a fired at-will employee may not sue his or her employer for wrongful discharge. Cochran is mistaken. Adams is seeking, inter alia, a reversal of the trial court's ruling that he was not entitled to recover damages for emotional distress, but he concedes that he suffered no physical injury as a result of his discharge. Nevertheless, District of Columbia law allows "a plaintiff [to] recover damages for mental suffering unaccompanied by physical injury as part of his recovery for an intentional tort." *Parker v. Stein*, 557 A.2d 1319, 1322 (D.C. 1989) (citations omitted). A reversal of the trial court's order denying Adams recovery for emotional distress would thus be an implied holding that wrongful discharge for refusing to violate the law is an

intentional tort, i.e., a recognition that there is a public policy exception to the well-established at-will doctrine. We must therefore address the issue directly, for we cannot decide whether Adams is entitled to damages[**9] for emotional distress without first deciding whether he has a cause of action and, if so, whether that cause of action sounds in tort or in contract.

B. The law in other jurisdictions

The leading case on the public policy exception to the at-will employment doctrine is *Petermann v. International Brotherhood of Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). In that case the plaintiff, an at-will employee of the defendant, a labor union, was subpoenaed to testify before a legislative committee about certain activities of that union. An officer of the union, acting as its agent, directed the plaintiff to testify falsely under oath at the hearings. After the plaintiff testified truthfully, the union fired him. The plaintiff then sued the union for wrongful discharge. The trial court granted the union's motion for summary judgment, but on appeal that judgment was reversed. The appellate court held that the right to discharge an at-will employee may be limited by considerations of public policy. The court noted that the concept of public policy was a vague one, not subject to precise definition, but concluded that the state had a declared public[**10] policy against perjury because perjury was a crime under [*32] the state criminal code. The court then said:

The threat of criminal prosecution would, in many cases, be a sufficient deterrent upon both the employer and employee, the former from soliciting and the latter from committing perjury. However, in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is [at will], when the reason for the discharge is the employee's refusal to commit perjury. . . . To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.

Id. at , 344 P.2d at 27. The court concluded that the plaintiff had stated a cause of action for wrongful discharge. n5

-----Footnotes-----

n5 The court in *Petermann* never stated whether the cause of action sounded in contract or in tort. California now recognizes, however, that wrongful discharge in violation of public policy is a tort. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (wrongful discharge, actionable in tort, to fire employee who refused to engage in illegal price-fixing).

-----End Footnotes-----

[**11]

[HN2] It seems to be universally accepted that an employer's discharge of an employee for the employee's refusal to violate a statute is a wrongful discharge in violation of public policy. See, e.g., *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985) (en banc); *Tameny v. Atlantic Richfield Co.*, supra note 5; *Girgenti v. Cali-Con, Inc.*, 15 Conn. App. 130, 544 A.2d 655 (1988); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987); *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). These and other cases have made clear that an employer cannot be allowed to require his or her employees to break the law as a condition of continued employment. As the court noted in *Petermann*, to permit further employment to be conditioned upon the employee's commission of an illegal act would "encourage criminal conduct upon the part of both the employee and employer and . . . is patently contrary to the public welfare." *Petermann*, [**12] supra, 174 Cal. App. 2d at , 344 P.2d at 27.

Most courts that have addressed the issue have concluded that [HN3] an action for wrongful discharge in violation of public policy is an action in tort, rather than in contract. See, e.g., *Tameny v. Atlantic Richfield Co.*, supra note 5, 27 Cal. 3d at , 610 P.2d at 1335, 164 Cal. Rptr. at ; *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 379, 652 P.2d 625, 631 (1982) (employer liable in tort for wrongfully discharging employee who cooperated with Department of Justice investigation); *Girgenti v. Cali-Con, Inc.*, supra, 15 Conn. App. at , 544 A.2d at 659; *Palmateer v. International*

597 A.2d 28, *; 1991 D.C. App. LEXIS 258, **;
6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

Harvester Co., 85 Ill. 2d 124, 132, 421 N.E.2d 876, 880, 52 Ill. Dec. 13, (1981) (wrongful discharge to terminate employee for reporting crimes of coworkers to law enforcement officials); Phipps v. Clark Oil & Refining Corp., supra, 408 N.W.2d at 571. Liability is grounded in the principle that the employer may not retaliate against an employee by discharging that employee for refusing to break the law. See W. PROSSER & W. KEETON, [**13] THE LAW OF TORTS § 130, at 1027-1028 (5th ed. 1984) (hereafter PROSSER). The employer engages in tortious conduct by affirmatively forcing the employee to choose between breaking the law and keeping his job. See Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 724 (Tex. 1990), aff'g 781 S.W.2d 408 (Tex. Ct. App. 1989). The wrongful discharge of an at-will employee in violation of public policy is thus an intentional tort. See PROSSER, supra, § 130, at 1029 (most wrongful discharge cases "appear to be grounded in intent rather than in negligence"). n6

-----Footnotes-----

n6 At least two jurisdictions recognize a cause of action for wrongful discharge in violation of public policy, but conclude that the action is in contract. Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 248, 743 S.W.2d 380, 385 (1988) (limiting damages to back pay only, but noting that if employer's conduct is sufficiently egregious, employee may bring separate tort action for "outrage"); Brockmeyer v. Dun & Bradstreet, supra, 113 Wis. 2d at 335 N.W.2d at 841.

The courts in two other states also allow at-will employees to bring wrongful discharge actions in contract. Although loosely based on "public policy," these courts' decisions are also based on covenants that the law implies in all contracts. Massachusetts implies a covenant of good faith and fair dealing in all employment contracts, including at-will employment relationships. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). In New Hampshire the courts impose a duty on the employer not to discharge an employee in "bad faith or malice." Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

-----End Footnotes-----

[**14]

[*33] On the subject of damages the case law is less instructive, but there is at least one case that offers some guidance. In Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. Unit A August 1981), a seaman alleged that he was fired in retaliation for filing a personal injury action against his employer. The Fifth Circuit held that the seaman had stated a cause of action in tort "under the general maritime law," id. at 1058, n7 and elaborated on the measure of damages available to him. The court held that the wrongfully discharged employee could recover compensatory damages not only for economic loss, but also for any emotional distress or mental anguish that he suffered as a result of the wrongful discharge. Id. at 1064. Likewise, the majority opinion in Sabine Pilot Service, supra, did not discuss the damages available to the wrongfully discharged employee, but the two concurring justices concluded that the plaintiff in that case could recover lost wages, both past and future, as well as "employee and retirement benefits that would have accrued had employment continued." 687 S.W.2d at 736[**15] (Kilgarlin, J., concurring).

-----Footnotes-----

n7 Whether such a claim would state a cause of action in tort under District of Columbia law is, of course, a matter on which we express no opinion.

-----End Footnotes-----

C. The result in the instant case

In this case the jury found that Cochran discharged Adams for his refusal to violate a municipal regulation that prohibits the operation of a vehicle without a valid inspection sticker. Unlike the plaintiff in Sorrells, Adams can point to 18 DCMR § 602.4 (1987) as an officially declared public policy. Compare Sorrells, supra, 565 A.2d at 289. n8 Given such a policy, we must decide whether to recognize and adopt a public policy exception to the general rule that an at-

597 A.2d 28, *, 1991 D.C. App. LEXIS 258, **;
6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

will employee may not sue a former employer in tort for wrongful discharge. Having reviewed the case law from other jurisdictions, we conclude that we should.

-----Footnotes-----

n8 Although Sorrells speaks of a "statutorily declared public policy," 565 A.2d at 289 (citing the dissent in Ivy, supra, 428 A.2d at 833), we see no reason not to include municipal regulations as well as statutes within the scope of that phrase. Regulations are issued by executive agencies under statutory authorization, and validly promulgated regulations, like statutes, have "the force and effect of law." Dankman v. District of Columbia Board of Elections and Ethics, 443 A.2d 507, 513 (D.C. 1981) (en banc) (citation omitted).

-----End Footnotes-----

[**16]

We find particularly helpful the opinion of the Supreme Court of Texas in Sabine Pilot Service, supra. The plaintiff in that case, a deckhand on a boat owned by Sabine, alleged that he had been fired for refusing to pump the bilges of that boat into coastal waters, an action which would have violated federal law. The trial court granted summary judgment for the employer, but the intermediate appellate court reversed and remanded for trial. The Supreme Court of Texas affirmed that ruling, holding that public policy "required a very narrow exception" to the at-will doctrine established in Texas law for almost a century. The court was careful to point out how narrow the exception was, saying that it would permit a fired at-will employee to sue for wrongful discharge only if the firing was "for the sole reason that the employee refused to perform an illegal act." 687 S.W.2d at 735. In the trial of such a case, moreover, it would be "the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act." Id. The Texas courts again addressed the scope of the exception in Winters v. Houston Chronicle [*34] Publishing Co., supra, [**17] in which the state Supreme Court affirmed the intermediate court's refusal, based on Sabine Pilot Service, to extend the exception to cover a claim by an employee that he was discharged for reporting illegal activities by other employees to his employer. The court noted that the plaintiff in Winters did not come within the exception recognized in Sabine Pilot Service because the plaintiff "was not forced to choose between risking criminal liability [and] being discharged from his livelihood." Winters, supra, 795 S.W.2d at 724.

We are persuaded that the Texas rule strikes the best balance between the sound and long-established at-will doctrine and the need to recognize and, when necessary, to enforce an identifiable public policy. Accordingly, we adopt the Texas rule and apply it to this case. Appellant Adams was forced to choose between violating the regulation and keeping his job--the very choice which, under Sabine Pilot Service and Winters, he should not have been required to make. Even though the criminal liability facing him was not very great, it was nonetheless unacceptable and unlawful for his employer to compel him to choose between breaking the law and keeping[**18] his job. We therefore hold, following the two Texas cases, that [HN4] there is a very narrow exception to the at-will doctrine under which a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee's refusal to violate the law, as expressed in a statute or municipal regulation. The burden of proving by a preponderance of the evidence that this was the sole reason shall be on the fired employee.

We also follow the majority rule and hold that this cause of action sounds in tort, and that the tort is intentional. See PROSSER, supra, § 130, at 1029. Because the goal of the exception is to further an officially declared public policy, the law should allow for the full range of remedies to discourage employers from such conduct. See Sterling Drug, Inc. v. Oxford, supra note 6, 294 Ark. at 239, 248, 743 S.W.2d at 388 (Purtle, J., dissenting from majority's conclusion that cause of action for wrongful discharge sounds in contract, and that damages are therefore limited to lost wages); Tameny v. Atlantic Richfield Co., supra note 5, 27 Cal. 3d at [**19] 610 P.2d at 1335, 164 Cal. Rptr. at [**19] 164 ("an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied [contract], but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes"). Those remedies should include compensatory damages not only for lost wages and other financial benefits, such as health insurance and retirement payments, but also for any emotional distress or mental anguish that the employee may suffer as a result of the wrongful discharge. Smith v. Atlas Off-Shore Boat Service, Inc., supra, 653 F.2d at 1064.

III. EMOTIONAL DISTRESS

Adams alleged in his complaint that he suffered "humiliation, mental anguish and emotional distress" and asked for, inter alia, damages of \$200,000. The complaint, however, did not make clear whether Adams was seeking damages for the separate tort of intentional infliction of emotional distress or was merely including this allegation as part of his claim for damages for wrongful discharge. The trial court, in its order granting Cochran's motion for summary judgment [**20] "with respect to damages for emotional distress," similarly did not state whether it was ruling on the emotional distress matter as a separate claim or as an element of damages under the wrongful discharge claim. We must therefore determine whether the evidence would support recovery under either of these two theories. n9

-----Footnotes-----

n9 In a memorandum filed in this court after oral argument, Adams states that he "did not allege a cause of action for intentional infliction of emotional distress" but only "sought damages for emotional distress as a consequence of the tort of wrongful discharge." In a footnote in that memorandum, however, Adams adds that it is "possible to infer that the complaint raised a claim of intentional infliction of emotional distress." In order to avoid any uncertainty on the point, we will so "infer" and rule accordingly.

-----End Footnotes-----

[*35] [HN5] To recover damages for the tort of intentional infliction of emotional distress, the plaintiff must show "(1) 'extreme and outrageous' conduct on the part of the defendant which[**21] (2) intentionally or recklessly (3) causes the plaintiff 'severe emotional distress.'" *Howard University v. Best*, 484 A.2d 958, 985 (D.C. 1984) (citations omitted). The evidence in this case, even when viewed in the light most favorable to Adams, shows only that Cochran fired him because he refused to violate the law by driving a truck without an inspection sticker. Cochran offered to pay any fines that Adams incurred, and there is no evidence that the truck posed a safety hazard to Adams or to the public at large. On this record Cochran's conduct cannot be called "extreme and outrageous," nor can it reasonably be said that any emotional distress suffered by Adams was the result of intentional or reckless behavior on the part of Cochran or its agents. Insofar as the complaint may be read as stating a claim of emotional distress as a separate tort, therefore, the trial court was surely correct in granting Cochran summary judgment on such a claim.

But that does not end our discussion. Having recognized a limited public policy exception to the rule that an at-will employee may not sue his or her former employer in tort for wrongful discharge, we have held in part II-C, [**22]supra, that the damages for such a tort may include compensation for any emotional distress or mental anguish resulting from the discharge. *Smith v. Atlas Off-Shore Boat Service, Inc.*, supra, 653 F.2d at 1064. Adams must therefore be given an opportunity to prove whether he suffered such emotional distress, as he alleged in his complaint and reiterated, in compliance with Super. Ct. Civ. R. 12-I (k), in his opposition to Cochran's motion for summary judgment. The trial court's grant of summary judgment on this aspect of his claim prevented him from introducing any evidence of his emotional distress at trial. That judgment must therefore be reversed and this case remanded for further proceedings on this issue.

IV. PUNITIVE DAMAGES

We turn finally to the trial court's two orders denying Adams leave to amend his complaint by adding a claim for punitive damages. Although [HN6] Super. Ct. Civ. R. 15 provides that leave to amend "shall be freely given when justice so requires," we have held that an order denying leave to amend under Rule 15 will not be reversed unless we are convinced that the trial court abused its discretion. *Eagle Wine & Liquor Co. v. Silverberg Electric Co.*, 402 A.2d 31, 34 (D.C. 1979) [**23] (citing cases). We find no abuse of discretion in this case.

Adams filed his first motion for leave to amend the complaint more than two years after the complaint was filed, and more than one year after discovery had closed and pretrial proceedings had been concluded. The motion was based on deposition testimony taken more than a year earlier. Moreover, the motion, if granted, would have required additional discovery and, in all likelihood, a delay in the trial. In these circumstances we cannot say that the court abused its

597 A.2d 28, *; 1991 D.C. App. LEXIS 258, **;
6 BNA IER CAS 1392; 120 Lab. Cas. (CCH) P56,767

discretion in denying the first motion. Since the second motion, filed four months later, offered nothing new, there was a fortiori no abuse of discretion in its denial. *Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10, 13-14 (D.C. 1983). n10

-----Footnotes-----

n10 Because we affirm the denial of both motions for leave to amend the complaint, we do not decide whether punitive damages are available in an action for wrongful discharge under what we now recognize as a public policy exception to the at-will employment doctrine. That is an issue which we leave for another day, for it is not an easy one to resolve. Compare *Smith v. Atlas Off-Shore Boat Service, Inc.*, supra, 653 F.2d at 1064 (reversing award of punitive damages as unfair to employer), with *Kessler v. Equity Management, Inc.*, 82 Md. App. 577, 591-592, 572 A.2d 1144, 1151-1152 (1990) (affirming denial of punitive damages, but suggesting that they might be available on a showing of "actual malice").

-----End Footnotes-----

[**24]

[*36] V. CONCLUSION

We affirm the trial court's denial of Adams' two motions for leave to amend his complaint by adding a claim for punitive damages. We also affirm the judgment awarding Adams \$7094.00 in back pay, since Cochran does not challenge that award and has not filed a cross-appeal. We reverse the trial court's order granting Cochran partial summary judgment on the issue of emotional distress and remand the case for a new trial on that issue or for other proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings.

CONCURBY: NEWMAN

CONCUR: NEWMAN, Senior Judge, concurring: It is long past the time when the public policy exception to the employment at will doctrine should have been recognized by this court. See *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981) (Ferren, J., joined by Newman, then C.J., and Kelly, J., dissenting from the denial of the Petition for Rehearing En Banc). I applaud the court for finally doing so. However, I regret that the court has chosen to adopt the most narrow possible exception ("the sole cause") following the Supreme Court of Texas in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). [**25] Respectfully, I note that the terse opinion of the majority in *Sabine* contains no discussion of the possible alternative tests, cites no authority, and relies solely on ipse dixit. There is no dearth of authority, either judicial or from commentators, pointing to a more realistic exception. See, e.g., authorities cited in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). Like the court in *Smith*, I would require that the employee prove "the employer's decision was motivated in substantial part" by the employee's refusal to break the law. *Smith*, supra, 653 F.2d at 1063. See also *Edwards v. Habib*, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618, 21 L. Ed. 2d 560, (1969) (retaliatory evictions); *Donohoe & Drury, Inc. v. Crowther*, 108 Daily Wash. L. Rptr. 2405, 2410-11 (D.C. Super. Ct. Dec. 24, 1980) (Schwelb, J.) (to prevail in an action for retaliatory eviction, the tenant need not show the landlord's "sole purpose" was to retaliate; rather, the tenant must show that retaliation was a "significant factor" in the landlord's [**26] decision to evict).

GERALD F. ADLER v. AMERICAN STANDARD CORPORATION
Misc. No. 12, September Term, 1980

Court of Appeals of Maryland

291 Md. 31; 432 A.2d 464; 1981 Md. LEXIS 244; 115 L.R.R.M.4130

July 16, 1981, Decided

PRIOR HISTORY: [***1]

Certification of Questions of Law from the United States District Court for the District of Maryland; Alexander Harvey, II, J.

DISPOSITION: Questions of law answered as herein set forth; costs to be divided equally between the parties in accordance with the Order of Certification.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee filed an action against defendant employer to recover damages for an alleged abusive discharge from his employment. The employer filed a motion to dismiss the complaint on the ground that it failed to state a cause of action under Maryland law. After conducting a hearing on the motion to dismiss, the United States District Court for the District of Maryland entered an order of certification.

OVERVIEW: The district court certified the following questions: (1) whether an action for "abusive discharge" was recognized under Maryland law and (2) whether the allegations in the amended complaint stated a cause of action for "abusive discharge. After engaging in a survey of state laws and other states' approaches to at-will employment, the court determined that Maryland recognized a cause of action for abusive discharge. However, the employee's complaint was too general and lacked the specifics to mount up to a prima facie showing that the claimed misconduct contravened Md. Ann. Code art. 27, §174, and thereby violated public policy. The employee failed to point to any statutory provision, which prohibited the alleged improper and possibly illegal practices of the employer. Additionally, his complaint did not provide a sufficient factual predicate for determining whether any declared mandate of public policy was violated. Thus, the employee's complaint was legally insufficient to state a cause of action for wrongful discharge.

OUTCOME: The court held that the state recognized a cause of action for abusive discharge of an at-will employee when the motivation for the discharge contravened a clear mandate of public policy. However, the amended complaint did not state a cause of action for abusive discharge because it failed to provide any factual details to support the general and conclusory averments of the complaint.

CORE TERMS: public policy, cause of action, wrongful discharge, discharged, falsification, abusive, fired, workmen's, contravened, salesman, terminable, motivation, discharging, retaliation, judicial decision, commercial bribery, misconduct, alteration, motive, bribes, certified question, state law, termination, actionable, employment contract, failed to state, terminated, contravene, vague, reporting

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN1] The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at-will, can be legally terminated at the pleasure of either party at any time.

Labor & Employment Law: Employment Relationships: At-Will Employment

Labor & Employment Law: Wrongful Termination: Public Policy

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***, 115 L.R.R.M. 4130

[HN2] Where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at-will has no right of action against his employer for wrongful discharge.

Governments: Courts: Judicial Precedents

[HN3] The Maryland Court of Appeals does not hesitate to adopt a new cause of action by judicial decision where that course is compelled by changing circumstances.

Business & Corporate Entities: Corporations: Directors & Officers: Management Duties & Liabilities

Criminal Law & Procedure: Criminal Offenses: Fraud

[HN4] Md. Ann. code art. 27, §174 declares it a misdemeanor for any officer or agent of any corporation fraudulently to sign, or in any other manner assent to any statement or publication, either for the public or the shareholders thereof, containing untruthful representations of its affairs, assets or liabilities with a view either to enhance or depress the market value of the shares therein, or the value of its corporate obligations, or in any other manner to accomplish any fraud thereby.

Governments: Legislation: Interpretation

[HN5] Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

Governments: Courts: Judicial Precedents

Governments: State & Territorial Governments: Legislatures

[HN6] The Court has not confined itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of Maryland. It has always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.

Labor & Employment Law: Employment Relationships: At-Will Employment

Labor & Employment Law: Wrongful Termination: Public Policy

[HN7] Maryland does recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy.

COUNSEL: J. Owen Zurhellen, III, with whom were Schonwald, Haber, Zurhellen & Mullman and Stephen D. Langhoff and Smith & Langhoff on the brief, for appellant.

H. Thomas Howell and Sidney G. Leech, with whom were Semmes, Bowen & Semmes on the[***3] brief, for appellee.

JUDGES: Murphy, C. J., and Smith, Digges, Eldridge, Cole, Davidson and Rodowsky, JJ. Murphy, C. J., delivered the opinion of the Court.

OPINIONBY: MURPHY

OPINION: [*32] [**465] The United States District Court for the District of Maryland, pursuant to Maryland Code (1974, 1980 Repl. Vol.), § 12-601 of the Courts and Judicial Proceedings Article, has certified for our determination the following questions of state law:

- (1) Is a cause of action for "abusive discharge" recognized under the substantive law of the State of Maryland?
- (2) Do the allegations of the Amended Complaint, if taken as true, state a cause of action for "abusive discharge" under the substantive law of the State of Maryland?

The amended complaint was filed by Gerald Adler against American Standard Corporation (the Corporation) to recover general, special and punitive damages for Adler's claimed "abusive discharge" from his employment with the

291 Md. 31, *, 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

Corporation. Adler alleged in his complaint that he was employed in March of 1975 as an Assistant General Manager of the Corporation's Commercial Printing Division at a salary of \$37,000 per year; that James Kinealy was Vice [*33] President[***4] and General Manager of the Division [**466] and James Sinclair was Vice President in charge of the Corporation's Graphic Arts Group, which encompassed the Commercial Printing Division; and that it was Adler's responsibility to conduct a thorough analysis of the management and operational structure of the Commercial Printing Division and to propose changes which would promote efficiency in management and operations and enhance the accuracy of intracorporate transmittal of information. The complaint alleged that Adler was "complimented for his efforts by his superiors" and by August 1, 1978 his annual salary had been increased to \$60,000. According to further averments of the amended complaint, Adler "discovered numerous inadequacies in the management and operation of the Commercial Printing Division and, also, numerous improper and possibly illegal practices, including:

- a. Attempts to treat capital expenditures as expenses.
- b. Payment of commercial bribes.
- c. Falsification of sales and income information, and alteration of commercial documents to support the falsified information.
- d. Misuse of corporate funds by officers for their personal benefit.
- e. Manipulation[***5] of work-in-process inventory information.
- f. Alteration of forecasts in connection with intra-corporate financial reporting."

The amended complaint alleged that on repeated occasions Adler reported his "discoveries" to Kinealy and Sinclair and made recommendations respecting their correction but that Kinealy and Sinclair "consistently failed and refused to give consideration to plaintiff's discoveries and recommendations and, indeed, discouraged further efforts on his part." The complaint alleged that Adler communicated his findings to the Corporation's headquarters personnel on several occasions and "was praised for his candor, was urged to continue his efforts and was assured that his position [*34] would not be jeopardized by so doing"; that as a result of Adler's activities Kinealy and Sinclair "became increasingly insecure and suspicious that . . . [Adler's] adherence to his stipulated responsibilities compromised their own positions"; that a high-level managerial meeting was scheduled for October 13, 1978, at which headquarters personnel were to be present; that Adler intended at that meeting "to discuss frankly the improprieties which troubled him"; that Kinealy[***6] and Sinclair insisted at that time that Adler resign; and that after Adler refused to resign, he received a letter signed by Kinealy and Sinclair on behalf of the Corporation informing him that his employment was terminated "for unsatisfactory performance." The amended complaint alleged that Adler's discharge by the Corporation "was motivated solely by its desire, and the desire of its superior management personnel, to conceal improprieties and illegal activities which plaintiff might have disclosed at the meeting scheduled for October 13, 1978 and on other occasions should he have remained in defendant's employ . . . including the payment of commercial bribes and the falsification of corporate records and financial statistics, . . . [which were] contrary to the public policy of the State of New York, the State of Maryland and of the United States, and thus constituted an abusive discharge."

The Corporation filed a motion to dismiss Adler's complaint on the ground that it failed to state a cause of action under Maryland law. In its Order of Certification, the District Court noted that a hearing was conducted on the motion to dismiss, at which Adler contended "that although he was[***7] an employee at will with no fixed term of employment and no written employment contract, he can maintain a cause of action against the defendant for 'abusive discharge' because the motives that prompted the defendant corporation to fire [him], namely the concealment of various activities (commercial bribery, falsification of corporate records, falsification of corporate financial data), were contrary to the public policy of the State of Maryland, especially in view of his satisfactory performance as evidenced by the regular salary increases and excellent performance appraisals." The Certification Order also noted that it [**467] was the Corporation's [*35] position that Maryland law does not recognize a cause of action for "abusive discharge," and that, in any event, Adler's discharge was prompted by a genuine dissatisfaction with his performance as an employee.

(A)

[HN1] The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time. *St. Comm'n on Human Rel. v. Amecom Div.*, 278 Md. 120, 360 A.2d 1 (1976); *Vincent v. Palmer*, 179 Md. 365, 19 A.2d [***8]183 (1941); *W., B. & A.R.R. Co. v. Moss*, 127 Md. 12, 96 A. 273 (1915). Statutes enacted by many states have, however, engrafted exceptions upon the terminable at will doctrine that abrogate an employer's absolute right to discharge an at will employee for any or no

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

reason. In Maryland, for example, under Maryland Code (1957, 1979 Repl. Vol.) Art. 49B, § 16 (a) (1), it is unlawful for an employer to discharge any employee "because of . . . race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment" n1

-----Footnotes-----

n1 The absolute right of the employer to discharge an employee is inhibited by other Maryland statutes. See, e.g., Code (1957, 1979 Repl. Vol.) Art. 89, § 43 (employee may not be discharged for involvement in the enforcement of Maryland's Occupational Safety and Health Act); Art. 101, § 39A (unlawful to discharge an employee for filing a workmen's compensation claim); § 15-606, Commercial Law Article (1975, 1980 Cum. Supp.) (unlawful to discharge employee whose wages are subjected to attachment under certain circumstances); §§ 8-105, 8-401, Courts & Judicial Proceedings Article (1974, 1980 Repl. Vol.) (unlawful to discharge employee for time lost because of jury service).

-----End Footnotes-----

***9]

Adler concedes that his discharge was not specifically prohibited by any Maryland statute. However, he urges that a judicial exception to the terminable at will doctrine be recognized in Maryland to permit an at will employee, discharged in a manner that contravenes public policy, to [*36] maintain a cause of action for abusive or wrongful discharge against his former employer. n2

-----Footnotes-----

n2 Courts have characterized this cause of action as one for "wrongful," "abusive," or "retaliatory" discharge. Our use of the phrase "wrongful discharge" encompasses all three appellations.

-----End Footnotes-----

Jurisdictions that have considered wrongful discharge actions as an exception to the common law terminable at will doctrine have followed essentially three courses of action. Some courts have flatly refused to recognize a cause of action for wrongful discharge, rigidly adhering to the rule that an employer's motivation for discharging an at will employee is irrelevant. See *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980); [***10] *Segal v. Arrow Industries Corp.*, 364 So. 2d 89 (Fla. Ct. App. 1978); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978). Other courts, while declining to recognize a cause of action for wrongful discharge on the facts of the cases before them, have indicated a willingness to adopt a judicial exception to the terminable at will doctrine in a proper case. See, e.g., *Lampe v. Presbyterian Med. Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Scroghan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977); *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Wis. App. 1980). Still other courts have recognized a cause of action for wrongful discharge, either in tort or in contract, and in doing so have primarily focused upon the employer's motivation for discharging the employee. [***11]

Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), held that an action for wrongful discharge of an at will employee would lie in contract. In that case, an at will employee had been fired as a result of her foreman's hostility towards [**468] her, which developed when she refused to socialize [*37] with him. The court, indicating that it sought to balance the interests of the employer and employee, affirmed the jury's award of damages and held that:

"[T]ermination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract." n3 *Id.* at 133, 316 A.2d at 551.

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

In *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), a salesman employed at will had been discharged because the employer sought to avoid payment of bonuses that the salesman would have earned upon delivery of certain goods. The court permitted the salesman to recover in an action in contract. Although refusing to extend its ruling to all employment at will contracts, the court held that the contract before it contained "an implied covenant[***12] of good faith and fair dealing" Id. at 101, 364 N.E.2d at 1256. Because the salesman's termination had not been in good faith, the court concluded that the employer had breached the employment contract. See *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

-----Footnotes-----

n3 In *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273, 1274 (1980), the Supreme Court of New Hampshire interpreted its *Monge* decision in the following manner: "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn."

-----End Footnotes-----

A majority of the courts expressly recognizing a cause of action for wrongful discharge have treated the employees' claims as tort actions. Several of these cases involve at will employees fired in retaliation for filing workmen's compensation claims. In *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973),[***13] the court held that a worker fired for exercising his statutorily conferred right to file a workmen's compensation claim was entitled to damages. In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the court stressed that the public policy of the State, as expressed in the workmen's compensation statute, [*38] could be effectively enforced only by allowing wrongfully discharged employees to maintain a personal action for damages. Other at will employees discharged for filing workmen's compensation claims have been given a right to recover damages because the discharge was for a socially undesirable motive, *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978), or because it was intended to contravene the State's public policy. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976). These cases, to some extent, relied on workmen's compensation statutes as a basis for recognition of the employees' causes of action.

An at will employee who had been discharged for refusing to participate in an illegal price fixing scheme was the subject of the court's inquiry in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. [***14] Rptr. 839 (1980). The court held that the discharge was actionable:

"[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." Id. at 178, 610 P.2d at 1336-37.

In *Harless v. First National Bank*, 246 S.E.2d 270, 275 (W. Va. 1978), discharge of an at will bank employee in retaliation for the employee's efforts to force the bank to comply with state and federal consumer credit laws was held to be actionable because the discharge contravened a "substantial public policy principle" -- the protection of consumers covered by the state and federal legislation. In *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), the court affirmed a jury award of compensatory damages made to [**469] an at will employee[***15] fired for serving on a jury. The court found [*39] the employee had been discharged "for such a socially undesirable motive that the employer must respond in damages for any injury done." Id. at 218, 536 P.2d at 515. In *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), an at will employee with responsibility for exercising control over the quality of the employer's food products was allegedly dismissed in retaliation for his insistence that the employer comply with a state law governing the labeling and licensing of the employer's products. The court, in recognizing a tort action for wrongful discharge, said that it had to decide "where and how to draw the line between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not." 427 A.2d at 387. Observing that the state law contained criminal penalties for its violation, the court concluded:

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

"We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. Certainly when there is a relevant state statute we should[***16] not ignore the statement of public policy that it represents. For today, it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." Id. at 389.

Finally, in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 424 N.E.2d 876, (Ill. Sup. Ct. 1981), an at will employee was fired for reporting the suspected criminal activity of a fellow employee to local law enforcement officials and agreeing to cooperate in the investigation and possible prosecution of the alleged crime. The court, in a 4-3 decision, held that the employee had stated a cause of action because: "The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses." 85 Ill. 2d at 133. The dissent criticized the majority's decision on the ground that: "Here the public policy supporting the cause of action cannot be found in any [*40] expression of the legislature, but only in the vague belief that public policy requires that we all become 'citizen crime-fighters.'" Id. at 136 (quoting[***17] from majority opinion at 133).

With few exceptions, courts recognizing a cause of action for wrongful discharge have to some extent relied on statutory expressions of public policy as a basis for the employee's claim. Courts holding that at will employees failed to state a cause of action, but recognizing implicitly or expressly that a cause of action would be recognized under proper circumstances, generally do so on the grounds that no clear mandate of public policy was contravened by the discharge. In *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), an employee at will had been discharged because of continual charges, made to company officials, that one of the company's products was unsafe. The employee, a salesman, had bypassed his immediate supervisors in making the charges and therefore failed to follow established procedures. The employee did not identify any specific statutory source of public policy as a basis for his action, but relied instead on the general notion that it was the public policy of the State to encourage production of safe products. Concluding that this was insufficient, the court observed that although the employee's motivation [***18] in making the charges may have been praiseworthy, that alone could not override "the company's legitimate interest in preserving its normal operational procedures from disruption." Id. at 183, 319 A.2d at 180 (footnote omitted). The court recognized that economic conditions had changed since 1891, when its predecessors had adopted the rule that an employer's motive for discharging an at will employee was irrelevant. Nevertheless, the court, in denying recovery, held that:

[HN2] "[W]here the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship [***470] and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge." Id. at 184-85, 319 A.2d at 180.

[*41] But see *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (at will employee fired for refusing to take a polygraph test stated cause of action for wrongful discharge under Pennsylvania law); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (at will employee fired because of taking time off from work for jury duty stated[***19] cause of action for wrongful discharge under Pennsylvania law).

In *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980), a medical doctor employed at will by a drug manufacturing company was discharged for refusing to continue work on development of a product that contained saccharine. Although the product could not be tested on human beings until the company had received the approval of the Federal Food and Drug Administration, the employee nevertheless felt that continued work on the product would violate her Hippocratic Oath. The court held that:

"[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy An employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy. However, unless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause." Id. at 72, 417 A.2d at 512.

The court held that the employee had failed to state a cause of action because she had not demonstrated[***20] that her refusal to continue working on the project was based on a clear mandate of public policy. The court said that her interpretation of the Hippocratic Oath did not amount to a clear mandate, and her discharge did not violate public policy.

291 Md. 31, *, 432 A.2d 464, **;
1981 Md. LEXIS 244, ***, 115 L.R.R.M. 4130

(B)

We recognize that modern economic conditions differ significantly from those that existed when the at will rule was [*42] first advanced in the latter part of the nineteenth century. See *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404 (1967). According to 1980 census statistics, a majority of American workers do not have the job security provided by collective bargaining agreements or civil service regulations. See *Comment, Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 Harv. L. Rev. 1816, 1816 n. 2 (1980). When terminated without notice, an employee is suddenly faced with an uncertain job future and the difficult prospect of meeting continuing economic obligations. But this circumstance, of itself, hardly warrants adoption of a rule that would forbid termination of at will employees [***21] whenever the termination appeared "wrongful" to a court or a jury. On the other hand, an at will employee's interest in job security, particularly when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty, is deserving of recognition. Equally to be considered is that the employer has an important interest in being able to discharge an at will employee whenever it would be beneficial to his business. Finally, society as a whole has an interest in ensuring that its laws and important public policies are not contravened. Any modification of the at will rule must take into account all of these interests.

As we have indicated, few courts have flatly rejected the notion that the wrongful discharge of an at will employee may give rise to a cause of action for damages. Where courts differ is in determining where the line is to be drawn that separates a wrongful from a legally permissible discharge. This determination depends in large part on whether the public policy allegedly [**471] violated is sufficiently clear to provide the [***22] basis for a tort or contract action for wrongful discharge.

The common law terminable at will doctrine in Maryland is, of course, subject to modification by judicial decision [*43] where this Court finds that it is no longer suitable to the circumstances of our people. *Condore v. Prince George's Co.*, 289 Md. 516, 425 A.2d 1011 (1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980). Nor [HN3] have we hesitated to adopt a new cause of action by judicial decision where that course was compelled by changing circumstances. See, e.g., *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977); *Deems v. Western Maryland Ry.*, 247 Md. 95, 231 A.2d 514 (1967). The reasoning of the growing number of jurisdictions that have recognized wrongful discharge as a new cause of action persuades us that, in a proper case, such an action should be adopted in this State. The fundamental issue then is whether Adler's amended complaint, on its face, contains allegations sufficient to state a cause of action for wrongful discharge. To answer this certified question, we must determine from the averments of the complaint whether Adler's discharge contravened some clear mandate of public policy. [***23]

Adler points to two sources of public policy. First, he contends that the misconduct of the Corporation's employees involving the payment of commercial bribes and the falsification of corporate records -- the disclosure of which prompted his discharge -- was in violation of the criminal law of the State, Md. Code (1957, 1976 Repl. Vol.) Art. 27, § 174. Second, he urges that practices such as commercial bribery and the falsification of corporate records are so clearly against public policy that he need not identify any statute or rule of law specifically prohibiting such improper and possibly illegal practices. Adler defines "public policy" as that which is "commonly accepted as necessary to the public good" -- a definition which encompasses more than violations of the criminal laws of the State. Adler maintains that because the allegations of the complaint demonstrate that his discharge by the Corporation was motivated by the latter's desire to prevent his further disclosure of the improper conduct, and to permit its continuation, his discharge was itself a violation of a clear mandate of public policy, giving rise to a cause of action for wrongful discharge.

Adler's reliance [***24] upon § 174 is misplaced. [HN4] The section [*44] declares it a misdemeanor for any officer or agent of any corporation

"fraudulently [to] sign, or in any other manner assent to any statement or publication, either for the public or the shareholders thereof, containing untruthful representations of its affairs, assets or liabilities with a view either to enhance or depress the market value of the shares therein, or the value of its corporate obligations, or in any other manner to accomplish any fraud thereby"

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

Accepting the averments of Adler's complaint as true, we think they are too general, too conclusory, too vague and lacking in specifics to mount up to a prima facie showing that the claimed misconduct contravened § 174 and hence violated the public policy of this State. Adler's complaint does not assert that the falsification of corporate records was done with an intent to defraud either stockholders or the public at large by enhancing or depressing the market value of the Corporation's shares or other obligations. As a result, the allegations of the complaint do not set forth a violation of the conduct proscribed by § 174. Indeed, during oral argument[***25] of the case before us, Adler's counsel was asked whether his complaint was intended to allege the commission of a crime. In response, he stated that he could not say one way or the other whether the claimed misconduct constituted a crime.

Nor do we think that the averments of Adler's complaint otherwise demonstrate a violation of a clear mandate of the public policy of this State. Judge Levine, writing for the Court, in *Md.-Nat'l Cap. P. & P. v. Wash. Nat'l Arena*, 282 Md. 588, 386 A.2d 1216 (1978), discussed the concept of public policy at length:

[**472] "Nearly 150 years ago Lord Truro set forth what has become the classical formulation of the public policy doctrine -- that to which we adhere in Maryland:

[*45] [HN5] 'Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.' *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 196 (1853).

. . . But beyond this relatively indeterminate description of the doctrine, [***26]jurists to this day have been unable to fashion a truly workable definition of public policy. Not being restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions), judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity Inevitably, conceptions of public policy tend to ebb and flow with the tides of public opinion, making it difficult for courts to apply the principle with any degree of certainty." *Id.* at 605-606, 386 A.2d at 1228 (citations omitted).

As indicated, [HN6] the Court has not confined itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this State. We have always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch. See *First Nat'l Bank v. Fid. & Dep. Co.*, 283 Md. 228, 389 A.2d 359 (1978).[***27] We have been consistently reluctant, for example, to strike down voluntary contractual arrangements on public policy grounds. See, e.g., *Food Fair Stores v. Joy*, 283 Md. 205, 389 A.2d 874 (1978); *Md.-Nat'l Cap. P. & P.*, *supra*. As Mr. Justice Sutherland stated for the Supreme Court in *Patton v. United States*, 281 U.S. 276, 306, 50 S. Ct. 253, 261, 74 L. Ed. 854 (1930):

[*46] "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another." (Emphasis added.)

To recapitulate, Adler's amended complaint alleged that he observed and disclosed the following "improper and possibly illegal practices" while employed by the Corporation: attempts to treat capital expenditures as expenses; payment of commercial bribes; falsification of corporate sales and income data and alteration of commercial documents to support the falsified[***28] information; misuse of corporate funds by officers for their personal benefit; manipulation of work-in-process inventory information; and alteration of forecasts in connection with intra-corporate financial reporting. The allegations suggest serious misconduct, yet Adler fails to provide any factual details to support the general and conclusory averments of the complaint. Nor does he point to any specific statutory provision, other than Art. 27, § 174, or other existing rule of law that particularly prohibits the claimed misconduct. While Adler suggested before us that the commercial bribery and falsification of corporate records violated the Sherman Act, 15 U.S.C. §§ 1-7 (1973), and the Maryland Antitrust Act, Md. Code (1975, 1980 Cum. Supp.) Commercial Law, §§ 11-201 to - 213, his complaint does not recite, with the requisite degree of specificity, the manner in which these statutory enactments were offended so as to constitute a violation of the public policy of this State. The bald allegations of Adler's complaint do

291 Md. 31, *; 432 A.2d 464, **;
1981 Md. LEXIS 244, ***; 115 L.R.R.M. 4130

not provide a sufficient factual predicate for determining whether any declared mandate of public policy was violated. Adler's undisclosed perception of what[***29] constitutes "commercial [**473]bribery" or "falsification of corporate documents" is hardly an adequate ground upon which to [*47] base a decision that such activities violate the declared or undeclared public policy of this State. The allegations are therefore legally insufficient to state a cause of action for wrongful discharge.

Accordingly, in answer to the first certified question, [HN7] Maryland does recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy; and in answer to the second certified question, the allegations of the amended complaint, taken as true, together with all reasonable inferences to be drawn therefrom, do not state a cause of action for abusive discharge.

Questions of law answered as herein set forth; costs to be divided equally between the parties in accordance with the Order of Certification.

KEVIN ALBRIGHT, PETITIONER v. ROGER OLIVER, ETC., ET AL.
No. 92-833

SUPREME COURT OF THE UNITED STATES

510 U.S. 266; 114 S. Ct. 807; 127 L. Ed. 2d 114; 1994 U.S.LEXIS 1319; 62 U.S.L.W. 4078; 94 Cal. Daily Op. Service 457; 94 Daily JournalDAR 855; 7 Fla. L. Weekly Fed. S 717

October 12, 1993, Argued
January 24, 1994, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 975 F.2d 343, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner asserted a 42 U.S.C.S. § 1983 action against respondent police officer alleging that the officer deprived petitioner of a Fourteenth Amendment substantive due process right to be free from criminal prosecution except upon probable cause. The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of petitioner's action for the failure to state a § 1983 claim. The Court granted certiorari to review that decision.

OVERVIEW: Petitioner surrendered to the officer after a warrant was issued for his arrest for selling a substance that looked like an illegal drug. The prosecution was later dismissed for failing to state an offense under Illinois law. Petitioner then alleged a § 1983 claim against the officer, claiming that he was denied a substantive due process "liberty" right to be free of criminal prosecution not based upon probable cause. In a plurality decision, the Court held that the claim was to be considered under the Fourth Amendment, not substantive due process, which did not afford petitioner relief. The Court reasoned that petitioner's surrender to the authorities constituted a seizure for purposes of the Fourth Amendment. The Court explained that where a particular amendment provided an explicit textual source of constitutional protection against a particular government behavior, that amendment, not the more generalized notion of substantive due process, was the guide for analyzing such claims. The Court expressed no view as to whether petitioner's claim could have succeeded under the Fourth Amendment because that question was not presented in the petition for certiorari.

OUTCOME: The Court affirmed the judgment of the court of appeals.

CORE TERMS: Fourth Amendment, seizure, probable cause, deprivation, arrest, Fourteenth Amendment, malicious prosecution, criminal prosecution, initiation, accusation, grand jury, liberty interest, deprivation of liberty, indictment, plurality, constitutional protection, common law, generalized, Fifth Amendment, common-law, Fourth Amendment's, preliminary hearing, perjured testimony, state law, commencement, prosecutor, detective, constitutional violation, probable-cause, reputation

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

[HN1] 42 U.S.C.S § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN2] As a general matter, the U.S. Supreme Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN3] Where a particular constitutional amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

DECISION: Suit under 42 USCS 1983 by person claiming infringement of due process right to be free from prosecution without probable cause held properly dismissed by Federal District Court.

SUMMARY: A college student filed an action in a Federal District Court under 42 USCS 1983 and claimed that a police detective employed by an Illinois city had deprived the student of substantive due process under the Federal Constitution's Fourteenth Amendment by infringing his "liberty interest" to be free from criminal prosecution except upon probable cause. The student included allegations to the effect that (1) an undercover informant reported to the detective that the informant had bought "cocaine," which substance turned out to be baking powder; (2) the detective testified about the transaction to an Illinois grand jury, which indicted the man whom the informant named for selling a substance which looked like an illegal drug; (3) when the detective went to serve the arrest warrant, he discovered that the man, who was a retired pharmacist, was unlikely to have committed the offense; (4) after further contact between the detective and the informant, a criminal information was issued charging the student, who was a son of the pharmacist, with selling the "look-alike" substance, followed by the issuance of an arrest warrant; (5) the student surrendered to the detective, but denied his guilt and was released after posting bond, on conditions including that he not leave the state without permission; and (6) while an Illinois state court, at a preliminary hearing, found probable cause to bind the student over for trial based on the detective's testimony that the student had sold the look-alike substance to the informant, the court, at a later pretrial hearing, dismissed the criminal action on the ground that the charge did not state an offense under Illinois law. The District Court, however, granted the detective's motion to dismiss on the ground that the complaint did not state a claim under 1983. On appeal, the United States Court of Appeals for the Seventh Circuit, affirming, expressed the view that prosecution without probable cause was a constitutional tort actionable under 1983 only if accompanied by incarceration, loss of employment, or some other palpable consequence (975 F2d 343).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, seven members of the court agreed that the Court of Appeals' judgment should be affirmed.

Rehnquist, Ch. J., announced the judgment of the court and, in an opinion joined by O'Connor, Scalia, and Ginsburg, JJ., expressed the view that (1) the student's claim to be free from prosecution without probable cause had to be judged under the Federal Constitution's Fourth Amendment--as the explicit textual source of constitutional protection against pretrial deprivations of liberty--rather than under substantive due process, which could afford the student no relief; (2) the student's surrender to the state's show of authority constituted a seizure for purposes of the Fourth Amendment; and (3) since the student's certiorari petition did not present the question whether his claim would succeed under the Fourth Amendment, such question should not be considered.

Scalia, J., concurring, expressed the view that, insofar as the Federal Constitution's Fifth and Sixth Amendments set forth procedural guarantees relating to the period before and during trial--including, under the Fifth Amendment's grand jury clause, a guarantee regarding the manner of indictment--such requirements were not to be supplemented through the device of procedural due process.

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

Ginsburg, J., concurring, expressed the view that the student (1) had asserted a Fourth Amendment claim in his complaint in District Court within the requisite time period after dismissal of the criminal action; but (2) had abandoned such Fourth Amendment claim in District Court and had not attempted to reassert it in the Supreme Court.

Kennedy, J., joined by Thomas, J., concurring in the judgment, (1) agreed that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process; but (2) expressed the view that (a) the student's due process claim concerned not his arrest but the malicious initiation of a baseless criminal prosecution against him, (b) the due process requirements for criminal proceedings did not include a standard for the initiation of a criminal prosecution, (c) a state actor's random and unauthorized deprivation of an interest protected by the common law of torts could not be challenged under 1983 so long as the state provided an adequate post deprivation remedy, and (d) Illinois provided a tort remedy for malicious prosecution.

Souter, J., concurring in the judgment, expressed the view that (1) since none of the student's claimed injuries--including limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond--was alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody, the student had not shown a substantial deprivation of liberty from the mere initiation of prosecution; and (2) although there might be exceptional cases--where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure--in which the issue arises as to whether there has been a substantial deprivation of liberty justifying the resting of compensation on a want of government power or a limitation of it independent of the Fourth Amendment, such issue did not arise in the case at hand.

Stevens, J., joined by Blackmun, J., dissenting, expressed the view that (1) the formal commencement of a criminal prosecution deprived an accused person of "liberty" as such term is used in the Fourteenth Amendment; (2) due process under the Fourteenth Amendment required that a criminal prosecution be predicated, at a minimum, on a finding of probable cause, and thus a state's compliance with facially valid procedures for initiating a prosecution was not by itself sufficient to meet the demands of due process without regard to the substance of the resulting probable cause determination; (3) the pretrial deprivation of liberty at issue in the case at hand was addressed by the grand jury clause of the Fifth Amendment, and although states were not required to use the grand jury procedure itself, it did not follow that the underlying liberty interest was unworthy of Fourteenth Amendment protection; and (4) the complaint in the case at hand sufficiently alleged a cause of action under 1983.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

affirmance -- 42 USCS 1983 action -- state criminal prosecution absent probable cause -- Fourth Amendment -- due process --

Headnote:

The United States Supreme Court will affirm, on certiorari, a Federal Court of Appeals' judgment which held--in affirming a Federal District Court's dismissal of an action brought under 42 USCS 1983 by a person who claimed that, with respect to his alleged surrender to a municipal police detective on a charge later dismissed by a state court for failure to state an offense under state law, the detective had deprived the person of substantive due process under the Federal Constitution's Fourteenth Amendment by infringing his "liberty interest" to be free from criminal prosecution except upon probable cause--that prosecution without probable cause was a constitutional tort actionable under 1983 only if accompanied by incarceration, loss of employment, or some other palpable consequence, where (1) four Justices of the Supreme Court are of the view that (a) the person's claim to be free from prosecution without probable cause must

510 U.S. 266, *, 114 S. Ct. 807, **,
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

be judged under the Federal Constitution's Fourth Amendment--as the explicit textual source of constitutional protection against pretrial deprivations of liberty--rather than under substantive due process, which can afford no relief, (b) the person's surrender to the state's show of authority constituted a seizure for purposes of the Fourth Amendment, and (c) since the person's certiorari petition did not present the question whether his claim would succeed under the Fourth Amendment, such question should not be considered; (2) two other Justices are of the view that (a) the person's due process claim concerns not his arrest but the malicious initiation of a baseless criminal prosecution against him, (b) the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution, (c) a state actor's random and unauthorized deprivation of an interest protected by the common law of torts cannot be challenged under 1983 so long as the state provides an adequate post deprivation remedy, and (d) the state in question provides a tort remedy for malicious prosecution; and (3) another Justice is of the view that (a) since none of the person's claimed injuries was alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody, the person has not shown a substantial deprivation of liberty from the mere initiation of prosecution, and (b) although there might be exceptional cases--where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure--in which the issue arises as to whether there has been a substantial deprivation of liberty justifying the resting of compensation on a want of government power or a limitation of it independent of the Fourth Amendment, such issue does not arise in the case at hand. [Per Rehnquist, Ch. J., and O'Connor, Scalia, Ginsburg, Kennedy, Thomas, and Souter, JJ. Dissenting: Stevens and Blackmun, JJ.]

[***HN2]

complaint -- acceptance of allegations --

Headnote:

On certiorari to review a Federal Court of Appeals' affirmance of a Federal District Court's grant of a motion to dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the United States Supreme Court must accept the well-pleaded allegations of the complaint as true. [Per Rehnquist, Ch. J., and O'Connor, Scalia, Ginsburg, Stevens, and Blackmun, JJ.]

[***HN3]

arrest -- due process -- Fourth Amendment --

Headnote:

A federal constitutional claim based on an arrest by state authorities without probable cause must be analyzed under the Federal Constitution's Fourth Amendment rather than under the due process clause of the Constitution's Fourteenth Amendment. [Per Rehnquist, Ch. J., and O'Connor, Scalia, Ginsburg, Kennedy, and Thomas, JJ. Dissenting: Stevens and Blackmun, JJ.]

SYLLABUS:

Upon learning that Illinois authorities had issued an arrest warrant charging him with the sale of a substance which looked like an illegal drug, petitioner Albright surrendered to respondent Oliver, a policeman, and was released after posting bond. At a preliminary hearing, Oliver testified that Albright sold the look-alike substance to a third party, and the court found probable cause to bind Albright over for trial. However, the court later dismissed the action on the ground that the charge did not state an offense under state law. Albright then filed this suit under 42 U.S.C. § 1983, alleging that Oliver deprived him of substantive due process under the Fourteenth Amendment -- his "liberty interest" -- to be free from criminal prosecution except upon probable cause. The District Court dismissed on the ground that the complaint did not state a claim under § 1983. The Court of Appeals affirmed, holding that prosecution without probable cause is a constitutional tort actionable under § 1983 only if accompanied by incarceration, loss of employment, or some other "palpable consequence."

Held: The judgment is affirmed.

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

CHIEF JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE GINSBURG, concluded that Albright's claimed right to be free from prosecution without probable cause must be judged under the Fourth Amendment, and that substantive due process, with its "scarce and open-ended" "guideposts for responsible decision-making," *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061, can afford Albright no relief. Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such a claim. *Graham v. Connor*, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865. The Fourth Amendment addresses the matter of pretrial deprivations of liberty, and the Court has noted that Amendment's relevance to the liberty deprivations that go hand in hand with criminal prosecutions. See *Gerstein v. Pugh*, 420 U.S. 103, 114, 43 L. Ed. 2d 54, 95 S. Ct. 854. The Court has said that the accused is not "entitled to judicial oversight or review of the decision to prosecute." *Id.*, at 118-119. But Albright was not merely charged; he submitted himself to arrest. No view is expressed as to whether his claim would succeed under the Fourth Amendment, since he has not presented the question in his certiorari petition. Pp. 271-275.

JUSTICE KENNEDY, joined by JUSTICE THOMAS, determined that Albright's due process claim concerns not his arrest but instead the malicious initiation of a baseless criminal prosecution against him. The due process requirements for criminal proceedings do not include a standard for the initiation of a prosecution. Moreover, even assuming, *arguendo*, that the common-law interest in freedom from malicious prosecution is protected by the Due Process Clause, there is neither need nor legitimacy in invoking 42 U.S.C. § 1983 in this case, given the fact that Illinois provides a tort remedy for malicious prosecution and the Court's holding in *Parratt v. Taylor*, 451 U.S. 527, 535-544, 68 L. Ed. 2d 420, 101 S. Ct. 1908, that a state actor's random and unauthorized deprivation of such a due process interest cannot be challenged under § 1983 so long as the State provides an adequate post deprivation remedy. Pp. 281-286.

JUSTICE SOUTER concluded that, because this case presents no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already, petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause. Substantive due process should be reserved for otherwise homeless substantial claims, and should not be relied on when doing so will duplicate protection that a more specific constitutional provision already bestows. Petitioner's asserted injuries -- including restraints on his movement, damage to his reputation, and mental anguish -- are not alleged to have flowed from the formal instrument of prosecution, as distinct from the ensuing police seizure of his person; have been treated by the Courts of Appeals as within the ambit of compensability under 42 U.S.C. § 1983 for Fourth Amendment violations; and usually occur only after an arrest or other seizure. Pp. 286-291.

COUNSEL: John H. Bisbee argued the cause for petitioner. With him on the briefs was Barry Nakell.

James G. Sotos argued the cause for respondents. With him on the brief were Michael W. Condon, Charles E. Hervas, and Michael D. Bersani. *

* Leon Friedman, Steven R. Shapiro, John A. Powell, and Harvey Grossman filed a brief for the American Civil Liberties Union et al. as amici curiae urging reversal.

Richard Ruda filed a brief for the National League of Cities et al. as amici curiae urging affirmance.

JUDGES: REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR, SCALIA, and GINSBURG, JJ., joined. SCALIA, J., post, p. 275, and GINSBURG, J., post, p. 276, filed concurring opinions. KENNEDY, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, post, p. 281. SOUTER, J., filed an opinion concurring in the judgment, post, p. 286. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 291.

OPINIONBY: REHNQUIST

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

OPINION: [*268] [***120] [**810] CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE GINSBURG join.

[***HR1A] A warrant was issued for petitioner's arrest by Illinois authorities, and upon learning of it he surrendered and was released on bail. The prosecution was later dismissed on the ground that the charge did not state an offense under Illinois law. Petitioner asks us to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause. We decline to do so.

[***HR2A] We review a decision of the Court of Appeals for the Seventh Circuit affirming the grant of a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and we must therefore accept the well-pleaded allegations of the complaint as true. Illinois authorities issued an arrest warrant for petitioner Kevin Albright, charging him on the basis of a previously filed criminal information with the sale of a substance which looked like an illegal drug. When he learned of the outstanding warrant, petitioner surrendered to respondent, Roger Oliver, a police detective employed by the city of Macomb, but denied his guilt of such an offense. He was released after posting bond, one of the conditions of which was that he not leave the State without permission of the court. n1

-----Footnotes-----

n1 Before the criminal information was filed, one Veda Moore, an undercover informant, had told Oliver that she bought cocaine from one John Albright, Jr., at a student hotel in Macomb. The "cocaine" turned out to be baking powder, however, and the grand jury indicted John Albright, Jr., for selling a "look-alike" substance. When Detective Oliver went to serve the arrest warrant, he discovered that John Albright, Jr., was a retired pharmacist in his sixties, and apparently realized he was on a false scent. After discovering that it could not have been the elderly Albright's son, John David, who was involved in the incident, Detective Oliver contacted Moore to see if the sale was actually made by petitioner Kevin Albright, a second son of John Albright, Jr. Moore confirmed that petitioner Kevin Albright made the sale.

-----End Footnotes-----

[*269] [***121] At a preliminary hearing, respondent Oliver testified that petitioner sold the look-alike substance to Moore, and the court found probable cause to bind petitioner over for trial. At a later pretrial hearing, the court dismissed the criminal action against petitioner on the ground that the charge did not state an offense under Illinois law.

[***HR1B] Albright then instituted this action under Rev. Stat. § 1979, 42 U.S.C. § 1983, against Detective Oliver in his individual and official capacities, alleging that Oliver deprived him of substantive due process under the Fourteenth Amendment -- his "liberty interest" -- to be free from criminal prosecution except [**811] upon probable cause. n2 The District Court granted respondent's motion to dismiss under Rule 12(b)(6) on the ground that the complaint did not state a claim under § 1983. n3 The Court of Appeals for the Seventh Circuit affirmed, 975 F.2d 343 (1992), relying on our decision in *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). The Court of Appeals held that prosecution without probable cause is a constitutional tort actionable under § 1983 only if accompanied by incarceration or loss of employment or some other "palpable [*270] consequence." 975 F.2d at 346-347. The panel of the Seventh Circuit reasoned that "just as in the garden-variety public-officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest." *Id.*, at 347. n4 We granted certiorari, 507 U.S. 959 (1993), [*271] and while [***122] we affirm the judgment below, we do so on different grounds. We hold that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged.

-----Footnotes-----

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

n2 The complaint also named the city of Macomb as a defendant to the § 1983 action and charged a common-law malicious prosecution claim against Detective Oliver.

n3 The District Court also held that Detective Oliver was entitled to a defense of qualified immunity, and that the complaint failed to allege facts sufficient to support municipal liability against the city of Macomb. The District Court also dismissed without prejudice the common-law claim of malicious prosecution against Detective Oliver. These issues are not before this Court.

n4 As noted by the Court of Appeals below, the extent to which a claim of malicious prosecution is actionable under § 1983 is one "on which there is an embarrassing diversity of judicial opinion." 975 F.2d at 345, citing *Brummett v. Camble*, 946 F.2d 1178, 1180, n.2 (CA5 1991) (cataloging divergence of approaches by the Courts of Appeals). Most of the lower courts recognize some form of malicious prosecution action under § 1983. The disagreement among the courts concerns whether malicious prosecutions, standing alone, can violate the Constitution. The most expansive approach is exemplified by the Third Circuit, which holds that the elements of a malicious prosecution action under § 1983 are the same as the common-law tort of malicious prosecution. See, e.g., *Lee v. Mihalich*, 847 F.2d 66, 70 (1988) ("The elements of liability for the constitutional tort of malicious prosecution under § 1983 coincide with those of the common law tort"). See also *Sanders v. English*, 950 F.2d 1152, 1159 (CA5 1992) ("Our circuit recognizes causes of action under § 1983 for false arrest, illegal detention . . . and malicious prosecution" because these causes of action "implicate the constitutional 'guarantees of the fourth and fourteenth amendments'"); *Robinson v. Maruffi*, 895 F.2d 649 (CA10 1990); *Strength v. Hubert*, 854 F.2d 421, 426, and n.5 (CA11 1988) (recognizing that "freedom from malicious prosecution is a federal right protected by § 1983"). Other Circuits, however, require a showing of some injury or deprivation of a constitutional magnitude in addition to the traditional elements of common-law malicious prosecution. The exact standards announced by the courts escape easy classification. See, e.g., *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (CA1 1990) (the challenged conduct must be "so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment"); *Usher v. Los Angeles*, 828 F.2d 556, 561-562 (CA9 1987) ("The general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to provide a remedy However, 'an exception exists to the general rule when a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights'"); *Coogan v. Wixom*, 820 F.2d 170, 175 (CA6 1987) (in addition to elements of malicious prosecution under state law, plaintiff must show an egregious misuse of a legal proceeding resulting in a constitutional deprivation). In holding that malicious prosecution is not actionable under § 1983 unless it is accompanied by incarceration, loss of protected status, or some other palpable consequence, the Seventh Circuit's decision below places it in this latter camp. In view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a "tort."

-----End Footnotes-----

Section 1983 [HN1] "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144, n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979). The first step in any such claim is to identify the specific constitutional right allegedly infringed. *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, [*812] 1870, 104 L. Ed. 2d 443 (1989); and *Baker v. McCollan*, *supra*, at 140.

Petitioner's claim before this Court is a very limited one. He claims that the action of respondents infringed his substantive due process right to be free of prosecution without probable cause. He does not claim that Illinois denied him the procedural due process guaranteed by the Fourteenth Amendment. Nor does he claim a violation of his Fourth Amendment rights, notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *Brower v. County of Inyo*, 489 U.S. 593, 596, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989). n5

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

-----Footnotes-----

n5 Thus, Albright may have missed the statute of limitations for any claim he had based on an unconstitutional arrest or seizure. 975 F.2d 343, 345 (CA7 1992). We express no opinion as to the timeliness of any such claim he might have.

-----End Footnotes-----

We begin analysis of petitioner's claim by repeating our observation in *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). [HN2] "As a general matter, the Court has always been reluctant to expand the concept of substantive due process [*272] because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-849, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (describing cases in which substantive due process rights have been recognized). Petitioner's claim to be free from prosecution except on the basis of probable cause is markedly different from those recognized in this group of cases.

Petitioner relies on our observations in cases such as *United States v. Salerno*, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 107 S. Ct. 2095 [***123] (1987), and *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), that the Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights. This is undoubtedly true, but it sheds little light on the scope of substantive due process. Petitioner points in particular to language from *Hurtado v. California*, 110 U.S. 516, 527, 28 L. Ed. 232, 4 S. Ct. 111 (1884), later quoted in *Daniels*, *supra*, stating that the words "by the law of the land" from the Magna Carta were "'intended to secure the individual from the arbitrary exercise of the powers of government.'" This, too, may be freely conceded, but it does not follow that, in all of the various aspects of a criminal prosecution, the only inquiry mandated by the Constitution is whether, in the view of the Court, the governmental action in question was "arbitrary."

Hurtado held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury. In the more than 100 years which have elapsed since *Hurtado* was decided, the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949), [*273] and holding the Fourth Amendment's exclusionary rule applicable to the States; *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97, 29 S. Ct. 14 (1908), and holding the Fifth Amendment's privilege against self-incrimination applicable to the States; *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), overruling *Palko v. Connecticut*, 302 U.S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937), and holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States; *Gideon v. Wainwright*, 372 U.S. 335, [**813] 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), overruling *Betts v. Brady*, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), and holding that the Sixth Amendment's right to counsel was applicable to the States. See also *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967) (Sixth Amendment speedy trial right applicable to the States); *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967) (Sixth Amendment right to compulsory process applicable to the States); *Duncan v. Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) (Sixth Amendment right to jury trial applicable to the States).

[***HR1C] [***HR3A] This course of decision has substituted, in these areas of criminal procedure, the specific guarantees of the various provisions of the Bill of Rights embodied in the first 10 Amendments to the Constitution for the more generalized language contained in the earlier cases construing the Fourteenth Amendment. It was through these provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. [HN3] Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more [***124]generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, *supra*, at 395. n6

-----Footnotes-----

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

n6 JUSTICE STEVENS' dissent faults us for ignoring, inter alia, our decision in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). *Winship* undoubtedly rejected the notion that all of the required incidents of a fundamentally fair trial were to be found in the provisions of the Bill of Rights, but it did so as a matter of procedural due process: "This notion [that the government must prove the elements of a criminal case beyond a reasonable doubt] - basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."" Id., at 362, quoting *Leland v. Oregon*, 343 U.S. 790, 802-803, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952) (Frankfurter, J., dissenting).

Similarly, other cases relied on by the dissent, including *Mooney v. Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935), *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959), *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), and *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), were accurately described in the latter opinion as "dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." Id., at 107.

-----End Footnotes-----

[*274] We think this principle is likewise applicable here. The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions. See *Gerstein v. Pugh*, 420 U.S. 103, 114, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest). We have said that the accused is not "entitled to judicial oversight or review of the decision to prosecute." Id., at 118-119. See also *Beck v. Washington*, 369 U.S. 541, 545, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962); *Lem Woon v. Oregon*, 229 U.S. 586, 57 L. Ed. 1340, 33 S. Ct. 783 (1913). But here petitioner was not merely charged; he submitted himself to arrest.

[*275] We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari. [*814] We do hold that substantive due process, with its "scarce and open ended" "guideposts," *Collins v. Harker Heights*, 503 U.S. at 125, can afford him no relief. n7

-----Footnotes-----

n7 Petitioner appears to have argued in the Court of Appeals some variant of a violation of his constitutional right to interstate travel because of the condition imposed upon him pursuant to his release on bond. But he has not presented any such question in his petition for certiorari and has not briefed the issue here. We therefore do not consider it.

-----End Footnotes-----

The judgment of the Court of Appeals is therefore

Affirmed.

CONCURBY: SCALIA; GINSBURG; KENNEDY; SOUTER

CONCUR: [***125] JUSTICE SCALIA, concurring.

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

One can conceive of many abuses of the trial process (for example, the use of a patently biased judge, see *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-466, 27 L. Ed. 2d 532, 91 S. Ct. 499 (1971)) that might cause a criminal sentence to be a deprivation of life, liberty or property without due process. But here there was no criminal sentence (the indictment was dismissed), and so the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest. I think it unlikely that the procedures constitutionally "due," with regard to an arrest, consist of anything more than what the Fourth Amendment specifies; but petitioner has in any case not invoked "procedural" due process.

Except insofar as our decisions have included within the Fourteenth Amendment certain explicit substantive protections of the Bill of Rights -- an extension I accept because it is both long established and narrowly limited -- I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471, 125 L. Ed. 2d 366, 113 S. Ct. 2711 [*276] (1993) (SCALIA, J., concurring). As I have acknowledged, however, see *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (opinion of SCALIA, J.), this Court's current jurisprudence is otherwise. But that jurisprudence rejects "the more generalized notion of 'substantive due process'" at least to this extent: It cannot be used to impose additional requirements upon such of the States' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights. *Graham v. Connor*, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). That proscription applies here. The Bill of Rights sets forth, in the Fifth and Sixth Amendments, procedural guarantees relating to the period before and during trial, including a guarantee (the Grand Jury Clause) regarding the manner of indictment. Those requirements are not to be supplemented through the device of "substantive due process."

For these reasons, in addition to those set forth by THE CHIEF JUSTICE, the judgment here should be affirmed.

JUSTICE GINSBURG, concurring.

I agree with the plurality that Albright's claim against the police officer responsible for his arrest is properly analyzed under the Fourth Amendment rather than under the heading of substantive due process. See ante, at 271. I therefore join the plurality opinion and write separately to indicate more particularly my reasons for viewing this case through a Fourth Amendment lens.

Albright's factual allegations convey that Detective Oliver notoriously disobeyed the injunction against unreasonable seizures imposed on police officers by the Fourth Amendment, and Albright appropriately invoked that Amendment as a basis for his claim. See App. to Pet. for Cert. A-37, A-53. Albright's submission to arrest unquestionably constituted a [***126] seizure for purposes of the Fourth Amendment. See ante, at 271. And, as the Court of Appeals recognized, if the facts were as Albright alleged, then Oliver lacked cause [*277] to suspect, let alone apprehend him. 975 F.2d 343, 345 (CA7 1992); see post, at 292-293 (STEVENSON, J., dissenting).

[**815] Yet in his presentations before this Court, Albright deliberately subordinated invocation of the Fourth Amendment and pressed, instead, a substantive due process right to be free from prosecution without probable cause. n1 This strategic decision appears to have been predicated on two doubtful assumptions, the first relating to the compass of the Fourth Amendment, the second, to the time frame for commencing this civil action.

-----Footnotes-----

n1 Albright's presentations essentially carve up the officer's conduct, though all part of a single scheme, so that the actions complained of match common-law tort categories: first, false arrest (Fourth Amendment's domain); next, malicious prosecution (Fifth Amendment territory). In my view, the constitutional tort 42 U.S.C. § 1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law. According the Fourth Amendment full sway, I would not force Albright's case into a different mold.

-----End Footnotes-----

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

Albright may have feared that courts would narrowly define the Fourth Amendment's key term "seizure" so as to deny full scope to his claim. In particular, he might have anticipated a holding that the "seizure" of his person ended when he was released from custody on bond, and a corresponding conclusion that Oliver's allegedly misleading testimony at the preliminary hearing escaped Fourth Amendment interdiction. n2

-----Footnotes-----

n2 Such a concern might have stemmed from Seventh Circuit precedent set before *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). See *Wilkins v. May*, 872 F.2d 190, 192-195 (1989) (substantive due process "shock the conscience" standard, not Fourth Amendment, applies to brutal "post-arrest pre-charge" interrogation).

-----End Footnotes-----

The Fourth Amendment's instruction to police officers seems to me more purposive and embracing. This Court has noted that the common law may aid contemporary inquiry into the meaning of the Amendment's term "seizure." See *California v. Hodari D.*, 499 U.S. 621, 626, n.2, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991). At common law, an arrested person's seizure was deemed to [*278]continue even after release from official custody. See, e.g., 2 M. Hale, *Pleas of the Crown* *124 ("he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers"); 4 W. Blackstone, *Commentaries* *297 (bail in both civil and criminal cases is "a delivery or bailment, of a person to his sureties, . . . he being supposed to continue in their friendly custody, instead of going to gaol"). The purpose of an arrest at common law, in both criminal and civil cases, was "only to compel an appearance in court," and "that purpose is equally answered, whether the sheriff detains [the suspect's] person, or takes sufficient security for his appearance, called bail." 3 id., at *290 (civil cases); 4 id., at *297 (nature of bail is the same in criminal and civil cases). The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control [***127] over a defendant's person, not one between seizure and its opposite. n3

-----Footnotes-----

n3 For other purposes, e.g., to determine the proper place for condemnation trials, "seizure" traditionally had a time- and site-specific meaning. See *Thompson v. Whitman*, 85 U.S. 457, 18 Wall. 457, 471, 21 L. Ed. 897 (1874) ("seizure [of a sloop] is a single act"; "possession, which follows seizure, is continuous").

-----End Footnotes-----

This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

[*279] A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not [**816] still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court. n4

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

-----Footnotes-----

n4 On the summons-and-complaint alternative to custodial arrest, see 2 W. LaFave, Search and Seizure 432-436 (2d ed. 1987).

-----End Footnotes-----

This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers. For Oliver, the Fourth Amendment governed both the manner of, and the cause for, arresting Albright. If Oliver gave misleading testimony at the preliminary hearing, that testimony served to maintain and reinforce the unlawful haling of Albright into court, and so perpetuated the Fourth Amendment violation. n5

-----Footnotes-----

n5 Albright's reliance on a "malicious prosecution" theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution -- in "the formal commencement of a criminal proceeding," see post, at 295 (STEVENS, J., dissenting) -- is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct. See *Burns v. Reed*, 500 U.S. 478, 487-492, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991). Under Albright's substantive due process theory, the star player is exonerated, but the supporting actor is not.

In fact, Albright's theory might succeed in exonerating the supporting actor as well. By focusing on the police officer's role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure, Albright's theory raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity. See post, at 308-309, n.26 (STEVENS, J., dissenting) (noting that the issue is open); cf. *Briscoe v. LaHue*, 460 U.S. 325, 326, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983) (holding that § 1983 does not "authorize a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his criminal trial"). A right to sue someone who is absolutely immune from suit would hardly be a right worth pursuing.

-----End Footnotes-----

[*280] A second reason for Albright's decision not to pursue a Fourth Amendment claim concerns the statute of limitations. The Court of Appeals [***128] suggested in dictum that any Fourth Amendment claim Albright might have had accrued on the date of his arrest, and that the applicable 2-year limitations period expired before the complaint was filed. n6 975 F.2d at 345. Albright expressed his acquiescence in this view at oral argument. Tr. of Oral Arg. 13, 20-21.

-----Footnotes-----

n6 In § 1983 actions, federal courts apply the state statute of limitations governing actions for personal injury. See *Wilson v. Garcia*, 471 U.S. 261, 276-280, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). The question when the limitations period begins to run, however, is one of federal law. See *id.*, at 268-271; see generally *Connors v. Hallmark & Son Coal Co.*, 290 U.S. App. D.C. 170, 935 F.2d 336, 341 (CA DC 1991) (collecting cases).

-----End Footnotes-----

Once it is recognized, however, that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the limitations period should have a different trigger. The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, i.e., upon dismissal of the criminal charges against Albright. See *McCune v. Grand Rapids*, 842 F.2d 903, 908 (CA6 1988) (Guy, J., concurring in result) ("Where . . . innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant."). In sum, Albright's Fourth Amendment claim, asserted within the requisite period after dismissal of the criminal action, in my judgment was neither substantively deficient nor inevitably time barred. It was, however, a claim Albright abandoned in the District Court and did not attempt to reassert in this Court. [*281] The principle of party [**817] presentation cautions decisionmakers against asserting it for him. See ante, at 275.

* * *

In *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), this Court refused to analyze under a "substantive due process" heading an individual's right to be free from police applications of excessive force. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of . . . governmental conduct," we said, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*, at 395. I conclude that the Fourth Amendment similarly proscribes the police misconduct Albright alleges. I therefore resist in this case the plea "to break new ground," see *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992), in a field -- substantive due process -- that "has at times been a treacherous [one] for this Court." See *Moore v. East Cleveland*, 431 U.S. 494, 502, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (opinion of Powell, J.).

JUSTICE KENNEDY, with whom JUSTICE THOMAS joins, concurring in the judgment.

[**HR1D] [***HR3B] I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations [***129] of due process. But I write because Albright's due process claim concerns not his arrest but instead the malicious initiation of a baseless criminal prosecution against him.

I

The State must, of course, comply with the constitutional requirements of due process before it convicts and sentences a person who has violated state law. The initial question here is whether the due process requirements for criminal proceedings include a standard for the initiation of a prosecution.

[*282] The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, see U.S. Const., Amdts. 5, 6, nor require a pretrial hearing to weigh evidence according to a given standard, see *Gerstein v. Pugh*, 420 U.S. 103, 119, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) ("[A] judicial hearing is not prerequisite to prosecution"); *Costello v. United States*, 350 U.S. 359, 363, 100 L. Ed. 397, 76 S. Ct. 406 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, . . . is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more") (footnote omitted). Instead, the Bill of Rights requires a grand jury indictment and a speedy trial where a petit jury can determine whether the charges are true. Amdts. 5, 6.

To be sure, we have held that a criminal rule or procedure that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)). With respect to the initiation of charges, however, the specific guarantees contained in the Bill of Rights mirror the traditional requirements of the criminal process. The common law provided for a grand jury indictment and a speedy trial; it did not provide a specific evidentiary standard applicable to a pretrial hearing on the merits of the charges or subject to later review by the courts. See *United States v. Williams*, 504 U.S. 36, 51, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992); *Costello*, supra, at 362-363; *United States v. Reed*, 2 Blatchf. 435, 27 F. Cas. 727, 738 (No. 16,134) (CC NDNY 1852) (Nelson, J.) ("No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof").

[**818] Moreover, because the Constitution requires a speedy trial but no pretrial hearing on the sufficiency of the charges [*283] (leaving aside the question of extended pretrial detention, see *County of Riverside v. McLaughlin*, 500

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991)), any standard governing the initiation of charges would be superfluous in providing protection during the criminal process. If the charges are not proved beyond a reasonable doubt at trial, the charges are dismissed; if the charges are proved beyond a reasonable doubt at trial, any standard applicable to the initiation of charges is irrelevant because it is perforce met. This case thus differs in kind from *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 [***130] (1970), and the other criminal cases where we have recognized due process requirements not specified in the Bill of Rights. The constitutional requirements we enforced in those cases ensured fundamental fairness in the determination of guilt at trial. See, e.g., *Mooney v. Holohan*, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935) (due process prohibits "deliberate deception of court and jury" by prosecution's knowing use of perjured testimony); ante, at 273-274, n.6.

[***HR1E] In sum, the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution.

II

That may not be the end of the due process inquiry, however. The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish -- both by tarnishing one's name and by costing the accused money in legal fees and the like. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 119, pp. 870-889 (5th ed. 1984); T. Cooley, *Law of Torts* 180-187 (1879). We have held, of course, that the Due Process Clause protects interests other than the interest in freedom from physical restraint, see *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), and for purposes of this case, we can assume, arguendo, that some of the interests granted historical protection by the common law of torts (such as the interests in freedom from defamation and malicious prosecution) [*284] are protected by the Due Process Clause. Even so, our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate post deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527, 535-544, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981); see *Hudson v. Palmer*, 468 U.S. 517, 531-536, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984); *Ingraham v. Wright*, 430 U.S. 651, 674-682, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977); id., at 701 (STEVENS, J., dissenting) ("adequate state remedy for defamation may satisfy the due process requirement when a State has impaired an individual's interest in his reputation").

The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. . . . Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" 451 U.S. at 544 (quoting *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)). The *Parratt* principle respects the delicate balance between [***131] state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their [**819] rights is afforded by the common law and the laws of the States, as well as by the Constitution. See *Parratt*, supra, at 531-532.

Yet it is fair to say that courts, including our own, have been cautious in invoking the rule of *Parratt*. See *Mann v. Tucson*, 782 F.2d 790, 798 (CA9 1986) (Sneed, J., concurring). [*285] That hesitancy is in part a recognition of the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action. We want to leave an avenue open for recourse where we think the federal power ought to be vindicated. Cf. *Screws v. United States*, 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945).

But the price of our ambivalence over the outer limits of *Parratt* has been its dilution and, in some respects, its transformation into a mere pleading exercise. The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter) and by treating claims based on the Due Process Clause as claims based on some other constitutional provision. See *Taylor v. Knapp*, 871 F.2d 803, 807 (CA9 1989) (Sneed, J., concurring). It has been avoided at the other end of the spectrum by construing complaints alleging a substantive injury as attacks on the adequacy of state procedures. See

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

Zinerman v. Burch, 494 U.S. 113, 139-151, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) (O'CONNOR, J., dissenting); Easter House v. Felder, 910 F.2d 1387, 1408 (CA7 1990) (Easterbrook, J., concurring). These evasions are unjustified given the clarity of the Parratt rule: In the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on "the Due Process Clause of the Fourteenth Amendment simpliciter." 451 U.S. at 536.

As Parratt's precedential force must be acknowledged, I think it disposes of this case. Illinois provides a tort remedy for malicious prosecution; indeed, Albright brought a state-law malicious prosecution claim, albeit after the statute of limitations had expired. (That fact does not affect the adequacy of the remedy under Parratt. See *Daniels v. Williams*, 474 U.S. 327, 342, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (STEVENS, J., concurring).) Given the state remedy and the holding of Parratt, there is [*286] neither need nor legitimacy to invoke § 1983 in this case. See 975 F.2d 343, 347 (CA7 1992) (case below).

III

That said, if a State did not provide a tort remedy for malicious prosecution, there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983. Compare *Ingraham v. Wright*, 430 U.S. at 676, id., at 701-702 (STEVENS, J., dissenting), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 [***132](1972), with *Paul v. Davis*, supra, at 711-712; see *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 93-94, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) (Marshall, J., concurring); *Martinez v. California*, 444 U.S. 277, 281-282, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980); *Munn v. Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77 (1877). But given the state tort remedy, we need not conduct that inquiry in this case.

* * *

For these reasons, I concur in the judgment of the Court holding that the dismissal of petitioner Albright's complaint was proper.

JUSTICE SOUTER, concurring in the judgment.

While I agree with the Court's judgment that petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause, I reach that result by a route different from that of [*820]the plurality. The Court has previously rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one. See *United States v. James Daniel Good Real Property*, ante, at 49 ("We have rejected the [*287] view that the applicability of one constitutional amendment pre-empts the guarantees of another"); *Soldal v. Cook County*, 506 U.S. 56, 70, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn"). It has likewise rejected the view that incorporation of the substantive guarantees of the first eight Amendments to the Constitution defines the limits of due process protection, see *Adamson v. California*, 332 U.S. 46, 89-92, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947) (Black, J., dissenting). The second Justice Harlan put it this way:

"The full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" *Poe v. Ullman*, 367 U.S. 497, 543, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (dissenting opinion).

We are, nonetheless, required by "the doctrine of judicial self-restraint . . . to exercise the utmost care whenever we are asked to break new ground in [the] field" of substantive due process. *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). Just as the concept of due process does not protect against insubstantial

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

impositions on liberty, neither should the "rational continuum" be reduced to the mere duplication of protections adequately addressed by other constitutional provisions. Justice Harlan could not infer that the due process guarantee was meant to protect against insubstantial burdens, and [***133] we are not free to infer that it was meant to be applied without thereby adding a substantial increment to protection otherwise available. The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly [*288] imposing on trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments with the ill-defined contours of some novel due process right. n1

-----Footnotes-----

n1 JUSTICE STEVENS suggests that these concerns are not for this Court, since Congress resolved them in deciding to provide a remedy for constitutional violations under § 1983. Post, at 312. The question before the Court, however, is not about the existence of a statutory remedy for an admitted constitutional violation, but whether a particular violation of substantive due process, as distinct from the Fourth Amendment, should be recognized on the facts pleaded. This question is indisputably within the province of the Court, and should be addressed with regard for the concerns about unnecessary duplication in constitutional adjudication reflected in *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975), and *Whitley v. Albers*, 475 U.S. 312, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986). Nothing in Congress's enactment of § 1983 suggests otherwise.

-----End Footnotes-----

This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions, see *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975), and *Whitley v. Albers*, 475 U.S. 312, 327, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986), in which the Court has resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed. n2 This case calls for just such restraint, [**821] in presenting [*289] no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already.

-----Footnotes-----

n2 Recognizing these concerns makes sense of what at first blush may seem a tension between our decisions in *Graham v. Connor*, *supra*, and *Gerstein v. Pugh*, *supra*, on the one hand, and *United States v. James Daniel Good Real Property*, *ante*, p. 43, and *Soldal v. Cook County*, 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992), on the other. The Court held in *Graham* that all claims of excessive force by law enforcement officials in the course of a "seizure" should be analyzed under the Fourth Amendment's "reasonableness" standard. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, *supra*, at 395. The *Gerstein* Court held that the Fourth Amendment, not the Due Process Clause, determines what post-arrest proceedings are required for suspects detained on criminal charges. *Gerstein v. Pugh*, *supra*. As we recently explained in *United States v. James Daniel Good Real Property*, *ante*, at 50, the Court reasoned in *Gerstein* that the Fourth Amendment "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases." See *Gerstein*, *supra*, at 125, n.27. Thus, in both *Gerstein* and *Graham*, separate analysis under the Due Process Clause was dispensed with as redundant. The Court has reached the same result in the context of claims of unnecessary and wanton infliction of pain in penal institutions. See *Whitley v. Albers*, *supra*, at 327 ("It would indeed be surprising if . . . 'conduct that shocks the conscience' or 'afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment, *Rochin v. California*, 342 U.S. 165, 172, 173, 96 L. Ed. 183, 72 S. Ct. 205 (1952), were not also punishment 'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' *Estelle v. Gamble*, 429 U.S. at 103, 106, in violation of the Eighth").

-----End Footnotes-----

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

[***HR1F] In framing his claim of infringement [***134] of a liberty interest in freedom from the initiation of a baseless prosecution, petitioner has chosen to disclaim any reliance on the Fourth Amendment seizure that followed when he surrendered himself into police custody. Petitioner has failed, however, to allege any substantial injury that is attributable to the former event, but not the latter. His complaint presents an extensive list of damages: limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond; financial expense of his legal defense; reputational harm among members of the community; inability to transact business or obtain employment in his local area, necessitating relocation to St. Louis; inability to secure credit; and personal pain and suffering. See App. to Pet. for Cert. 49a-50a. None of these injuries, however, is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody. Thus, petitioner has not shown a substantial deprivation of liberty from the mere initiation of prosecution.

The significance of this failure follows from the recognition that none of petitioner's alleged injuries has been treated by the Courts of Appeals as beyond the ambit of compensability [*290] under the general rule of 42 U.S.C. § 1983 liability for a seizure unlawful under Fourth Amendment standards, see *Tennessee v. Garner*, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) (affirming § 1983 liability based on Fourth Amendment violation); *Brower v. County of Inyo*, 489 U.S. 593, 599, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989) (unreasonable seizure in violation of the Fourth Amendment gives rise to § 1983 liability). On the contrary, the Courts of Appeals have held that injuries like those petitioner alleges are cognizable in § 1983 claims founded upon arrests that are bad under the Fourth Amendment. See, e.g., *Hale v. Fish*, 899 F.2d 390, 403-404 (CA5 1990) (affirming award of damages for mental anguish, harm to reputation, and legal fees for defense); *B. C. R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 12 (CA1 1984) (affirming award of damages for destruction of business due to publicity surrounding illegal search); *Sims v. Mulcahy*, 902 F.2d 524, 532-533 (CA7 1990) (approving damages for pain, suffering, and mental anguish in the context of a challenge to jury instructions); *Sevigny v. Dicksey*, 846 F.2d 953, 959 (CA4 1988) (affirming damages for extreme emotional distress); *Dennis v. [**822] Warren*, 779 F.2d 245, 248-249 (CA5 1985) (affirming award of damages for pain, suffering, humiliation, and embarrassment); *Konczak v. Tyrrell*, 603 F.2d 13, 17 (CA7 1979) (affirming damages for lost wages, mental distress, humiliation, loss of reputation, and general pain and suffering).

Indeed, it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment, since the injuries usually occur only after an arrest or other Fourth Amendment seizure, an event that normally follows promptly (three days in this case) upon the formality of filing an indictment, information, or complaint. There is no restraint on movement until a seizure occurs or bond terms are imposed. Damage to reputation and all of its attendant harms also tend to show up after arrest. The defendant's mental anguish (whether premised on reputational harm, burden [***135] of defending, incarceration, or some other consequence [*291] of prosecution) customarily will not arise before an arrest, or at least before the notification that an arrest warrant has been issued, informs him of the charges.

There may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure. Whether any such unusual case may reveal a substantial deprivation of liberty, and so justify a court in resting compensation on a want of government power or a limitation of it independent of the Fourth Amendment, are issues to be faced only when they arise. They do not arise in this case and I accordingly concur in the judgment of the Court. n3

-----Footnotes-----

n3 JUSTICE STEVENS argues that the fact that "few of petitioner's injuries flowed solely from the filing of the charges against him does not make those injuries insubstantial," post, at 312 (emphasis in original), and maintains that the arbitrary filing of criminal charges may work substantial harm on liberty. Ibid. While I do not quarrel with either proposition, neither of them addresses the threshold question whether the complaint alleges any substantial deprivation beyond the scope of what settled law recognizes at the present time.

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

-----End Footnotes-----

DISSENTBY: STEVENS

DISSENT: JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime. Under that Amendment, no accusation may issue except on a grand jury determination that there is probable cause to support the accusation. n1 The question presented by this case is whether the Due Process Clause of the Fourteenth Amendment imposes any comparable constraint on state governments.

-----Footnotes-----

n1 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. Const., Amdt. 5. See also *United States v. Calandra*, 414 U.S. 338, 343, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974).

-----End Footnotes-----

[*292] In *Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1884), we decided that the Due Process Clause does not compel the States to proceed by way of grand jury indictment when they initiate a prosecution. In reaching that conclusion, however, we noted that the substance of the federal guarantee was preserved by California's requirement that a magistrate certify "to the probable guilt of the defendant." *Id.*, at 538. In accord with *Hurtado*, I would hold that Illinois may dispense with the grand jury procedure only if the substance of the probable-cause requirement remains adequately protected. n2

-----Footnotes-----

n2 In *Hurtado*, 110 U.S. at 532, the Court made this comment on the traditions inherited from English law, with particular reference to the Magna Carta:

"Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

". . . Such regulations, to adopt a sentence of Burke's, 'may alter the mode and application but have no power over the substance of original justice.'"

-----End Footnotes-----

[**823] I

[**HR2B] Assuming, as we must, that [***136] the allegations of petitioner's complaint are true, it is perfectly clear that the probable-cause requirement was not satisfied in this case. Indeed, it is plain that respondent Oliver, who attested to the criminal information against petitioner, either knew or should have known that he did not have probable cause to initiate criminal proceedings.

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

Oliver's only evidence against petitioner came from a paid informant who established her unreliability on more than 50 occasions, when her false accusations led to aborted and dismissed prosecutions. n3 Nothing about her performance in [*293] this case suggested any improvement on her record. The substance she described as cocaine turned out to be baking soda. She twice misidentified her alleged vendor before, in response to a leading question, she agreed that petitioner might be he; n4 in fact, she had never had any contact with petitioner. As the Court of Appeals correctly concluded, the commencement of a serious criminal proceeding on such "scanty grounds" was nothing short of "shocking." n5

-----Footnotes-----

n3 According to the complaint, Oliver, a detective in the Macomb, Illinois, Police Department, agreed to provide Veda Moore with protection and money in exchange for her assistance in acting as a confidential informant. Allegedly, Moore, addicted to cocaine, lied to Oliver about her undercover purchases of controlled substances in order to receive the promised payments. During the course of her tenure as an informant, Moore falsely implicated over 50 individuals in criminal activity, resulting each time in a dismissed prosecution.

n4 Relying entirely on information provided by Moore, Oliver testified before a grand jury and secured an indictment against a first suspect, John Albright, Jr., for selling a "look-alike" substance in violation of Illinois law. When he attempted to arrest John Albright, Jr., however, Oliver became convinced that he had the wrong man, and substituted the name of a second suspect, Albright's son, on the arrest warrant. Once again, it became clear that Oliver's suspect could not have committed the crime. Oliver then asked Moore whether her vendor might have been a different son of the man she had first identified. When Moore admitted of that possibility, Oliver attested to the criminal information charging petitioner, his third and final suspect, with a felony.

n5 "Detective Oliver made no effort to corroborate Veda Moore's unsubstantiated accusation. A heap of baking soda was no corroboration. Her initial misidentification of the seller cast grave doubt on the accuracy of her information. And this was part of a pattern: of fifty persons she reported to Oliver as trafficking in drugs, none was successfully prosecuted for any crime. In the case of 'Albright,' Oliver should have suspected that Moore had bought cocaine either from she knew not whom or from someone she was afraid to snitch on (remember that she had gone to work for Oliver in the first place because she was being threatened by a man to whom she owed money for previous purchases of cocaine), that she had consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random. The fact that she used her informant's reward to buy cocaine makes this hypothesis all the more plausible. An arrest is a serious business. To arrest a person on the scanty grounds that are alleged to be all that Oliver had to go on is shocking." 975 F.2d 343, 345 (CA7 1992).

-----End Footnotes-----

[*294] These shocking factual allegations give rise to two important questions of law: does the commencement of formal criminal proceedings deprive the accused person of "liberty" as that term is used in the Fourteenth Amendment; and, if so, are the demands of "due process" satisfied solely by compliance with certain procedural formalities which ordinarily ensure that a prosecution will not commence absent probable cause? I shall discuss these questions separately, and then comment on the several opinions supporting the Court's judgment.

[***137] II

Punishment by confinement in prison is a frequent conclusion of criminal proceedings. Had petitioner's prosecution resulted in his conviction and incarceration, then there is no question but that the Due Process Clause would have been implicated; a central purpose of the Fourteenth Amendment was to deny States the power to impose this sort of deprivation of liberty until after completion [**824] of a fair trial. Over the years, however, our cases have made it clear

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

that the interests protected by the Due Process Clause extend well beyond freedom from an improper criminal conviction.

As a qualitative matter, we have decided that the liberty secured by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint. Although its contours have never been defined precisely, that liberty surely includes the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place. n6 On a quantitative level, we have, to be sure, acknowledged [*295] that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. Cf. *Meachum v. Fano*, 427 U.S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976). At the same time, however, we have recognized that a variety of state actions have such serious effects on protected liberty interests that they may not be undertaken arbitrarily, n7 or without observing procedural safeguards. n8

-----Footnotes-----

n6 As we stated in *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923):

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.*, at 399 (citations omitted).

n7 See, e. g., *Turner v. Safley*, 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987) (invalidating prison regulation of inmate marriages); *Moore v. East Cleveland*, 431 U.S. 494, 500, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (striking down ordinance that prohibited certain relatives from residing together because it had only a "tenuous relation" to its goals); *Wieman v. Updegraff*, 344 U.S. 183, 191, 97 L. Ed. 216, 73 S. Ct. 215 (1952) (requiring loyalty oaths of public employees violates due process because "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (state law requiring parents to send children to public school violates due process because "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State").

n8 See, e. g., *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'" (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950))); *Goss v. Lopez*, 419 U.S. 565, 581, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975) ("Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-437, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential").

-----End Footnotes-----

In my opinion, the formal commencement [***138] of a criminal proceeding is quintessentially this type of state action. The initiation of a criminal prosecution, regardless of whether it [*296] prompts an arrest, immediately produces "a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 814, 107

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

S. Ct. 2124, 95 L. Ed. 2d 740 (1987). Every prosecution, like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971). In short, an official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation [*825] of liberty meriting constitutional protection. n9

-----Footnotes-----

n9 The Court of Appeals was persuaded that the Court's reasoning in *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976), required a different conclusion. 975 F.2d at 345. Even if one accepts the dubious proposition that an individual's interest in his or her reputation simpliciter is not an interest in liberty, *Paul v. Davis* recognized that liberty is infringed by governmental conduct that injures reputation in conjunction with other interests. 424 U.S. at 701. The commencement of a criminal prosecution is certainly such conduct.

-----End Footnotes-----

III

The next question, of course, is what measure of "due process" must be provided an accused in connection with this deprivation of liberty. In *In re Winship*, 397 U.S. 358, 361-364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), we relied on both history and certain societal interests to find that, in the context of criminal conviction, due process entails proof of guilt beyond a reasonable doubt. The same considerations support a requirement that criminal prosecution be predicated, at a minimum, on a finding of probable cause.

It has been the historical practice in our jurisprudence to withhold the filing of criminal charges until the state can marshal evidence establishing probable cause that an identifiable defendant has committed a crime. This long tradition [*297] is reflected in the common-law tort of malicious prosecution, n10 as well as in our cases. n11 In addition, the probable-cause requirement serves valuable societal interests, protecting the populace [***139] from the whim and caprice of governmental agents without unduly burdening the government's prosecutorial function. n12 Consistent with our reasoning in *Winship*, these factors lead to the conclusion that one element of the "due process" prescribed by the Fourteenth Amendment is a responsible decision that there is probable cause to prosecute. n13

-----Footnotes-----

n10 See, e.g., W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 119, pp. 876-882 (5th ed. 1984).

n11 *Wayte v. United States*, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); *Gerstein v. Pugh*, 420 U.S. 103, 119, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) ("The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt"); see also *United States v. Lovasco*, 431 U.S. 783, 791, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977) (noting that "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause") (footnote omitted); *United States v. Calandra*, 414 U.S. at 343 (noting that one of the "grand jury's historic functions" was to determine whether probable cause existed); *Dinsman v. Wilkes*, 53 U.S. 390, 12 How. 390, 402, 13 L. Ed. 1036 (1852) (noting that instigation of a criminal prosecution without probable cause creates an action for malicious prosecution).

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

n12 Because probable cause is already required for an arrest, and proof beyond a reasonable doubt for a conviction, the burden on law enforcement is not appreciably enhanced by a requirement of probable cause for prosecution.

n13 I thus disagree with dicta to the contrary in a footnote in *Gerstein v. Pugh*, 420 U.S. at 125, n.26 ("Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial"). As I have explained, the commencement of criminal proceedings itself infringes on liberty interests, regardless of the restraints imposed.

-----End Footnotes-----

Illinois has established procedures intended to ensure that evidence of "the probable guilt of the defendant," see *Hurtado*, [*298] 110 U.S. at 538, has been assembled before a criminal prosecution is pursued. n14 Petitioner does not challenge the [**826] general adequacy of these procedures. Rather, he claims that the probable-cause determination in his case was invalid as a substantive matter, because it was wholly unsupported by reliable evidence and tainted by Oliver's disregard or suppression of facts bearing on the reliability of his informant. This contention requires us to consider whether a state's compliance with facially valid procedures for initiating a prosecution is by itself sufficient to meet the demands of due process, without regard to the substance of the resulting probable-cause determination.

-----Footnotes-----

n14 At the time of this suit, Illinois law allowed the filing of felony charges only by information or indictment. Ill. Rev. Stat., Ch. 38, § 111-2(a) (1987). If the filing were by information, as was the case here, then the charges could be filed but not pursued until a preliminary hearing had been held or waived pursuant to Ch. 38, § 109-3, and, if held, had concluded in a finding of probable cause to believe that the defendant had committed an offense. Ch. 38, §§ 111-2(a), 109-3.

-----End Footnotes-----

Fortunately, our prior cases have rejected such a formalistic approach to the Due Process Clause. In *Mooney v. Holohan*, 294 U.S. 103, 110, 79 L. Ed. 791, 55 S. Ct. 340 (1935), a criminal defendant claimed that the prosecutor's knowing use of perjured testimony, and deliberate suppression of evidence that would have impeached that testimony, constituted a denial of due process. The State urged us to reject this submission on the ground that the petitioner's trial had been free of procedural error. Our treatment of the State's argument should dispose of the analogous defense advanced today:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie [*299] at the base of our civil and political institutions. *Hebert v. Louisiana*, 272 U.S. 312, 316, 317, 71 [***140] L. Ed. 270, 47 S. Ct. 103 [(1926)]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.*, at 112.

In the years since *Mooney*, we have consistently reaffirmed this understanding of the requirements of due process. Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused. n15 It is, in other words, well

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

established that adherence to procedural forms will not save a conviction that rests in substance on false evidence or deliberate deception.

-----Footnotes-----

n15 See, e.g., *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392, and n.8 (1976) (citing cases); *Giglio v. United States*, 405 U.S. 150, 153-154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972) (failure to disclose Government agreement with witness violates due process); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) ("Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959) (failure of State to correct testimony known to be false violates due process); *Pyle v. Kansas*, 317 U.S. 213, 215-216, 87 L. Ed. 214, 63 S. Ct. 177 (1942) (allegations of the knowing use of perjured testimony and the suppression of evidence favorable to the accused "sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody"). But cf. *United States v. Williams*, 504 U.S. 36, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992) (prosecutor need not present exculpatory evidence in his possession to the grand jury).

-----End Footnotes-----

[*300] Just as perjured testimony may invalidate an otherwise proper conviction, so also may the absence of proof render a criminal conviction unconstitutional. The traditional assumption that "proof of a criminal charge beyond a reasonable doubt is constitutionally required," *Winship*, 397 U.S. at 362, has been endorsed explicitly and tied directly to the Due Process Clause. [**827]Id., at 364. n16 When the quantum of proof supporting a conviction falls sufficiently far below this standard, then the Due Process Clause requires that the conviction be set aside, even in the absence of any procedural error. *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

-----Footnotes-----

n16 "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re *Winship*, 397 U.S. at 364.

-----End Footnotes-----

In short, we have already recognized that certain substantive defects can vitiate the protection ordinarily afforded by a trial, so that formal compliance with procedural rules is no longer enough to satisfy the demands of due process. The same is true of a facially valid determination of probable cause. Even if prescribed [***141] procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which "no rational trier of fact" could base a finding of probable cause, cf. id., at 324, simply does not comport with the requirements of the Due Process Clause.

IV

I do not understand the plurality to take issue with the proposition that commencement of a criminal case deprives the accused of liberty, or that the state has a duty to make a probable-cause determination before filing charges. Instead, both THE CHIEF JUSTICE and JUSTICE SCALIA identify petitioner's reliance on a "substantive due process" theory as the critical flaw in his argument. Because there is no substantive due process right available to petitioner, they [*301] conclude, his due process claim can be rejected in its entirety and without further consideration.

In my opinion, this approach places undue weight on the label petitioner has attached to his claim. n17 The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

distinguish between substantive and procedural due process, see *Daniels v. Williams*, 474 U.S. 327, 337-340, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (STEVENS, J., concurring in judgments), the two concepts are not mutually exclusive, and their protections often overlap.

-----Footnotes-----

n17 In any event, it should be noted that in presenting his question for review, petitioner invokes the Due Process Clause generally, without reference to "substantive" due process. See Pet. for Cert. i.

-----End Footnotes-----

Indeed, the Fourth Amendment, upon which the plurality principally relies, provides both procedural and substantive protections, and these protections converge. When the Court first held that the right to be free from unreasonable official searches was "implicit in 'the concept of ordered liberty,'" and therefore protected by the Due Process Clause of the Fourteenth Amendment, *Wolf v. Colorado*, 338 U.S. 25, 27-28, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949), it refused to require the States to provide the procedures accorded in federal trials to protect that right. n18 *Id.*, at 28-33. Significantly, however, when we overruled the procedural component of that decision in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), we made it clear that we were "extending the substantive protections of due process to all constitutionally unreasonable searches -- state or federal" *Id.*, at 655 (emphasis added).

-----Footnotes-----

n18 Our refusal in *Wolf* to require States to adopt a federal rule of procedure -- the exclusionary rule -- paralleled our earlier refusal in *Hurtado* to require States to adopt a federal rule of procedure -- the grand jury process for ascertaining probable cause. Nevertheless, both cases recognized that the Fourteenth Amendment protected the substantive rights as implicit in the concept of ordered liberty.

-----End Footnotes-----

Moreover, in *Winship*, we found it unnecessary to clarify whether our holding rested on substantive or procedural due process grounds; it was enough to say that the "Due [*302] [**828] Process Clause" itself requires proof beyond a reasonable doubt. 397 U.S. at 364. Similarly, whether the analogous probable-cause standard urged by petitioner is more appropriately characterized as substantive or procedural [***142] is not a matter of overriding significance. In either event, the same Due Process Clause operates to protect the individual against the abuse of governmental power, by guaranteeing that no criminal prosecution shall be initiated except on a finding of probable cause.

V

According to the plurality, the application of certain portions of the Bill of Rights to the States through the Fourteenth Amendment "has substituted, in these areas of criminal procedure, the specific guarantees of the various provisions of the Bill of Rights . . . for the more generalized language contained in the earlier cases construing the Fourteenth Amendment." Ante, at 273. The plurality then reasons, in purported reliance on *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), that because the Fourth Amendment is designed to address pretrial deprivations of liberty, petitioner's claim must be analyzed under that Amendment alone. Ante, at 273-274. In the end, however, THE CHIEF JUSTICE concludes that he need not consider petitioner's claim under the Fourth Amendment after all, because that question was not presented in the petition for certiorari. Ante, at 275.

There are two glaring flaws in the plurality's analysis. First, the pretrial deprivation of liberty at issue in this case is addressed by a particular Amendment, but not the Fourth; rather, it is addressed by the Grand Jury Clause of the Fifth Amendment. That the Framers saw fit to provide a specific procedural guarantee against arbitrary accusations indicates the importance they attached to the liberty interest at stake. Though we have not required the States to use the grand jury

510 U.S. 266, *, 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

procedure itself, it by no means follows that the underlying liberty interest is unworthy of Fourteenth Amendment [*303] protection. As we explained in *Hurtado*, "bulwarks" of protection such as the Magna Carta and the Due Process Clause "guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."
n19

-----Footnotes-----

n19 *Hurtado v. California*, 110 U.S. 516, 532, 28 L. Ed. 232, 4 S. Ct. 111 (1884). See n.2, *supra*.

-----End Footnotes-----

Second, and of greater importance, the cramped view of the Fourteenth Amendment taken by the plurality has been rejected time and time again by this Court. In his famous dissenting opinion in *Adamson v. California*, 332 U.S. 46, 89-92, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947), Justice Black took the position that the Due Process Clause of the Fourteenth Amendment makes the entire Bill of Rights applicable to the States. As a corollary, he advanced a theory not unlike that endorsed today by THE CHIEF JUSTICE and JUSTICE SCALIA: that the express guarantees of the Bill of Rights mark the outer limit of Due Process Clause protection. *Ibid*. What is critical, for present purposes, is that the *Adamson* majority rejected this contention and held instead that the "ordered liberty" protected by the Due Process Clause is not coextensive with the specific provisions of the first eight Amendments to the Constitution. Justice Frankfurter's concurrence made this point perfectly clear:

"[***143] It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. . . . The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency" *Id.*, at 66.

In the years since *Adamson*, the Court has shown no inclination to reconsider its repudiation of Justice Black's position. n20 [*304] [*829] Instead, the Court has identified numerous violations of due process that have no counterparts in the specific guarantees of the Bill of Rights. And contrary to the suggestion of the plurality, *ante*, at 271-272, 273, these decisions have not been limited to the realm outside criminal law. As I have already discussed, it is the Due Process Clause itself, and not some explicit provision of the Bill of Rights, that forbids the use of perjured testimony and the suppression of evidence favorable to the accused. n21 Similarly, we have held that the Due Process Clause requires an impartial judge, n22 and prohibits the use of unnecessarily suggestive identification procedures. n23 Characteristically, Justice Black was the sole dissenter when the Court concluded in *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966), that the failure to control disruptive influences in the courtroom constitutes a denial of due process.

-----Footnotes-----

n20 Indeed, no other Justice has joined Justice Black in maintaining that the scope of the Due Process Clause is limited to the specific guarantees of the Bill of Rights. Although Justice Douglas joined Justice Black in dissent in *Adamson*, he later retreated from this position. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); L. Tribe, *American Constitutional Law* § 11-2, p. 774, and n.32 (2d ed. 1988).

n21 See n.15, *supra*.

n22 *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927).

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

n23 *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967). Justice Black dissented. *Id.*, at 303-306.

-----End Footnotes-----

Perhaps most important, and virtually ignored by the plurality today, is our holding in *In re Winship* that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt." 397 U.S. at 364. Because the reasonable-doubt standard has no explicit textual source in the Bill of Rights, the *Winship* Court was faced with precisely the same argument now advanced by THE CHIEF JUSTICE and JUSTICE SCALIA: Noting the procedural guarantees for which the Bill of Rights specifically provides in criminal cases, Justice Black maintained that "the Constitution thus goes into some detail to spell out what kind [*305] of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders." *Id.*, at 377 (dissenting opinion). Holding otherwise, the *Winship* majority resoundingly rejected this position, which Justice Harlan characterized as "fl[y]ing in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the [***144] procedures government may adopt in its dealing with its citizens" *Id.*, at 373, n.5 (concurring opinion).

Nevertheless, THE CHIEF JUSTICE and JUSTICE SCALIA seem intent on resuscitating a theory that has never been viable, by reading our opinion in *Graham v. Connor* more broadly than our actual holding. In *Graham*, which involved a claim of excessive force in the context of an arrest or investigatory stop, we held that "because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." 490 U.S. at 395. Under *Graham*, then, the existence of a specific protection in the Bill of Rights that is incorporated by the Due Process Clause may preclude what would in any event be redundant reliance on a more general conception of liberty. n24 Nothing in *Graham*, however, forecloses a general due process claim when a more specific source of protection is absent or, as here, open to question. See ante, at 275 (reserving question [*306] whether Fourth [**830] Amendment protects against filing of charges without probable cause).

-----Footnotes-----

n24 Moreover, it likely made no difference to the outcome in *Graham* that the Court rested its decision on the Fourth Amendment rather than the Due Process Clause. The text of the Fourth Amendment's prohibition against "unreasonable" seizures is no more specific than the Due Process Clause's prohibition against deprivations of liberty without "due process." Under either provision, the appropriate standards for evaluating excessive force claims must be developed through the same common-law process of case-by-case adjudication.

-----End Footnotes-----

At bottom, the plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow "substituted" the specific provisions of the Bill of Rights for the "more generalized language contained in the earlier cases construing the Fourteenth Amendment." Ante, at 273. In fact, the incorporation cases themselves rely on the very "generalized language" THE CHIEF JUSTICE would have them displacing. n25 Those cases add to the liberty protected by the Due Process Clause most of the specific guarantees of the first eight Amendments, but they do not purport to take anything away; that a liberty interest is not the subject of an incorporated provision of the Bill of Rights does not remove it from the ambit of the Due Process Clause. I cannot improve on Justice Harlan's statement of this settled proposition:

"[***145] The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

bear arms; the freedom from unreasonable [*307] searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (dissenting opinion).

-----Footnotes-----

n25 See, e. g., *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) (applying the exclusionary rule to the States because "without that rule the freedom from state invasions of privacy would be so ephemeral . . . as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'"); *Benton v. Maryland*, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) (holding that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment"); *Duncan v. Louisiana*, 391 U.S. 145, 149, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee").

-----End Footnotes-----

I have no doubt that an official accusation of an infamous crime constitutes a deprivation of liberty worthy of constitutional protection. The Framers of the Bill of Rights so concluded, and there is no reason to believe that the sponsors of the Fourteenth Amendment held a different view. The Due Process Clause of that Amendment should therefore be construed to require a responsible determination of probable cause before such a deprivation is effected.

VI

A separate comment on JUSTICE GINSBURG's opinion is appropriate. I agree with her explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable. Had it been conducted by a federal officer, it would have violated the Fourth Amendment. And, because unreasonable official seizures by state officers are deprivations of liberty or property without due process of law, the seizure of petitioner violated the Fourteenth Amendment. Accordingly, JUSTICE GINSBURG is correct in concluding that the complaint sufficiently alleges a cause of action under 42 U.S.C. § 1983.

Having concluded that the complaint states a cause of action, however, her opinion does not adequately explain why a dismissal of that complaint should be affirmed. Her submission, as I understand it, rests on the propositions that (1) petitioner abandoned a meritorious claim based on the component of the Due Process Clause of the Fourteenth Amendment that is coterminous with the Fourth Amendment; [*308] and (2) the Due Process [**831] Clause provides no protection for deprivations of liberty associated with the initiation of a criminal prosecution unless an unreasonable seizure occurs. For reasons already stated, I firmly disagree with the second proposition.

In the Bill of Rights, the Framers provided constitutional protection against unfounded felony accusations in the Grand Jury Clause of the Fifth Amendment and separate protection against unwarranted arrests in the Fourth Amendment. Quite obviously, they did not regard the latter protection as sufficient to avoid the harm associated with an irresponsible official accusation of serious criminal conduct. Therefore, although in most cases an arrest or summons to appear in court may promptly follow the initiation of criminal proceedings, the accusation itself causes a harm that is analytically, [***146] and often temporally, distinct from the arrest. In this very case, the petitioner suffered a significant injury before he voluntarily surrendered. n26 In other cases a significant [*309] interval may separate the formal accusation from the arrest, possibly because the accused is out of the jurisdiction or because of administrative delays in effecting the arrest. n27

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

-----Footnotes-----

n26 The petitioner was deprived of a constitutionally protected liberty interest at the moment that he was formally charged with a crime -- an event that occurred prior to his seizure, and several months prior to the preliminary hearing. I agree with JUSTICE GINSBURG that the officer's incomplete testimony at the preliminary hearing perpetuated the violation of petitioner's right to be free from unreasonable seizure, ante, at 279, but it also perpetuated the violation of his right to be free from prosecution absent probable cause. As such, contrary to her suggestion, ante, at 277, n.1, either constitutional violation -- the prosecution absent probable cause or the unreasonable seizure -- can independently support an action under 42 U.S.C. § 1983.

Furthermore, although JUSTICE GINSBURG speculates that respondent may be fully protected from damages liability by an immunity defense, ante, at 279, and n.5, that issue is neither free of difficulty, cf. *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993), nor properly before us. See plurality opinion, ante, at 269, n.3. The question on which we granted certiorari is whether the initiation of criminal charges absent probable cause is a deprivation of liberty protected by the Due Process Clause. Neither the fact that the seizure caused by petitioner's arrest also deprived him of liberty, nor the possible availability of an affirmative defense, is a sufficient reason for failing to discuss or decide this question. The question whether one is protected by the Due Process Clause from unfounded prosecutions has implications beyond whether damages are ultimately obtainable. Indeed, in this very case petitioner's complaint sought injunctive relief in addition to damages.

n27 See, e. g., *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520, 112 S. Ct. 2686 (1992) (time lag between indictment and arrest of 8 1/2 years due in part to the defendant's absence from the country and in part to the Government's negligence).

-----End Footnotes-----

Because the constitutional protection against unfounded accusations is distinct from, and somewhat broader than, the protection against unreasonable seizures, there is no reason why an abandonment of a claim based on the seizure should constitute a waiver of the claim based on the accusation. Moreover, a case holding that allegations of police misconduct in connection with an arrest or seizure are adequately reviewed under the Fourth Amendment's reasonableness standard, *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), tells us nothing about how unwarranted accusations should be evaluated.

Graham merely held that the due process right to be free from police applications of excessive force when state officers effect a seizure is governed by the same reasonableness standard as that governing seizures effected by federal officers. *Id.*, at 394-395. In the unlawful seizure context exemplified by Graham, there is no need to differentiate between a so-called Fourth Amendment theory and a substantive due process theory because they are coextensive. n28 Whether viewed through [**832] a Fourth Amendment lens or a substantive [*310] [***147] due process lens, the substantive right protected is the same.

-----Footnotes-----

n28 It is worthwhile to emphasize that the Fourth Amendment itself does not apply to state actors. It is only because the Court has held that the privacy rights protected against federal invasion by that Amendment are implicit in the concept of ordered liberty protected by the Due Process Clause of the Fourteenth Amendment that the Fourth Amendment has any relevance in this case. Strictly speaking, petitioner's claim is based entirely and exclusively on the Fourteenth Amendment's Due Process Clause.

-----End Footnotes-----

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

When, however, the scope of the Fourth Amendment protection does not fully encompass the liberty interest at stake - as in this case -- it is both unwise and unfair to place a blinder on the lens that focuses on the specific right being asserted. Although history teaches us that the Fourth and Fifth Amendments have been viewed "as running 'almost into each other,'" *Mapp v. Ohio*, 367 U.S. at 646, quoting *Boyd v. United States*, 116 U.S. 616, 630, 29 L. Ed. 746, 6 S. Ct. 524 (1886), and citing *Entick v. Carrington*, 19 How. St. Tr. 1029 (C. P. 1765), we have never previously thought that the area of overlapping protection should constrain the independent protection provided by either.

VII

Although JUSTICE SOUTER leaves open the possibility that in some future case, a due process claim could be stated for a prosecution absent probable cause, he concludes that this is not such a case. He is persuaded that the federal remedy for Fourth Amendment violations provides an adequate justification for refusing to "break new ground" by recognizing the "novel due process right" asserted by petitioner. Ante, at 287, 288. Like THE CHIEF JUSTICE, ante, at 271, 275, and JUSTICE GINSBURG, ante, at 281, he points to *Collins v. Harker Heights*, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992), as a pertinent example of our reluctance "to expand the concept of substantive due process . . . in [an] uncharted area." Id., at 125. Our relevant holding in that case was that a city's failure to provide an employee with a reasonably safe place to work did not violate the Federal Constitution. We unanimously characterized the petitioner's constitutional claim as "unprecedented." Id., at 127. The contrast between *Collins* and this case could not be more stark.

The lineage of the constitutional right asserted in this case dates back to the Magna Carta. See n.2, supra. In an [*311] early Massachusetts case, Chief Justice Shaw described it as follows:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 74 Mass. 329, 344 (1857).

Moreover, most of the Courts of Appeals have treated claims of prosecutions without probable cause as within "the ambit of compensability under the general rule of 42 U.S.C. § 1983 liability," see ante, at 289-290 (SOUTER, J., concurring in judgment). See, e.g., *Golino v. New Haven*, 950 F.2d 864, 866-867 (CA2 1991) (and case cited therein), cert. denied, 505 U.S. 1221 (1992); *Robinson v. Maruffi*, 895 F.2d 649, 654-657 (CA10 1990) (citing [***148] cases); *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 408 (CA1 1990) (citing cases, and finding cause of action if "egregious"); *Goodwin v. Metts*, 885 F.2d 157, 162 (CA4 1989) (citing cases), cert. denied, 494 U.S. 1081 (1990); *Rose v. Bartle*, 871 F.2d 331, 348-349 (CA3 1989) (citing cases); *Strength v. Hubert*, 854 F.2d 421 (CA11 1988); *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (CA5 1984).

Given the abundance of precedent in the Courts of Appeals, the vintage of the liberty interest at stake, and the fact that the Fifth Amendment categorically forbids the Federal Government from initiating a felony prosecution without presentment to a grand jury, it is quite wrong to characterize petitioner's claim as an invitation to enter uncharted territory. On the contrary, the claim is manifestly of constitutional dimension.

[*312] [**833] This conclusion should end our inquiry. Whether the Due Process Clause in any given case may provide a "duplication of protections," ante, at 287 (SOUTER, J., concurring in judgment) is irrelevant to whether a liberty interest is at stake. n29 Even assuming the dubious proposition that, in this case, due process protection against a baseless prosecution may not provide "a substantial increment to protection otherwise available," *ibid.*, n30 that is a consideration relevant only to damages, not to the existence of constitutional protection. Furthermore, that few of petitioner's injuries flowed solely from the filing of the charges against him does not make those injuries insubstantial. To the contrary, I can think of few powers that the State possesses which, if arbitrarily imposed, can harm liberty as substantially as the filing of criminal charges.

-----Footnotes-----

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

n29 JUSTICE SOUTER relies in part upon "pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct." Ante, at 287. I see no basis for that concern in this case. Moreover, Congress properly weighs "pragmatic concerns" when it decides whether to provide a remedy for a violation of federal law. Such concerns motivated the enactment of § 1983 -- a statute that provides a remedy for constitutional violations. Thus, if such a violation is alleged -- and I am satisfied that one is here -- we have a duty to enforce the statute without examining pragmatic concerns.

n30 It seems to me quite wrong to attribute to a subsequent arrest the reputational and other harms caused by an unjustified accusation. In addition, although JUSTICE GINSBURG is prepared to hold that a Fourth Amendment claim does not accrue until the baseless charges are dismissed, at least some of the Courts of Appeals have held that the arrest triggers the running of the statute of limitations. See, e. g., *Rose v. Bartle*, 871 F.2d 331, 351 (CA3 1989); *McCune v. Grand Rapids*, 842 F.2d 903, 906 (CA6 1988); *Mack v. Varelas*, 835 F.2d 995, 1000 (CA2 1987); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (CA9 1983). And, given the disposition of this case, a majority of this Court might agree. In any event, uncertainties about such matters counsel against constitutional adjudication based upon "pragmatic concerns."

-----End Footnotes-----

[*313] VIII

While the supposed adequacy of an alternative federal remedy persuades JUSTICES GINSBURG and SOUTER that petitioner's claim fails, the availability of an alternative state remedy convinces JUSTICE KENNEDY. I must therefore explain why I do not agree with his reliance on *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In 1975, I helped plant the seed that ultimately flowered into the *Parratt* doctrine. See *Bonner v. Coughlin*, 517 F.2d 1311, 1318-1319 (CA7 1975), modified en [*314] banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978) (cited in *Parratt v. Taylor*, 451 U.S. at 541-542). The plaintiff in *Bonner*, like the plaintiff in *Parratt*, claimed that the negligence of state agents had deprived him of a property interest "without due process of law." In both cases, the claim was rejected because a predeprivation remedy was infeasible and the State's post deprivation remedy was considered adequate to prevent a constitutional violation. *Parratt v. Taylor*, 451 U.S. at 543-544; *Bonner v. Coughlin*, 517 F.2d at 1319-1320. Both of those cases involved the type of ordinary common-law tort that can be committed by anyone. Such torts are not deprivations "without due process" simply because the tortfeasor is a public official.

The rationale of those cases is inapplicable to this case whether one views the claim at issue as substantive or procedural. n31 If one views the petitioner's claim as one of substantive due process, *Parratt* is categorically inapplicable. *Zimmerman v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). Conversely, if one views his claim as one of procedural due process, *Parratt* is also inapplicable, because its rationale does not apply to officially authorized deprivations of liberty or property.

-----Footnotes-----

n31 See 1 S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 3.15, pp. 211-212 (3d ed. 1991).

-----End Footnotes-----

[*314] Thus, contrary to JUSTICE KENNEDY's conclusion, ante, at 285, *Parratt*'s "precedential force" does not dispose of this case. Petitioner was subjected to criminal charges [*314] by an affirmative, deliberate act of a state official. n32 The filing of criminal charges is effectuated through established state procedures under which government agents, such as respondent Oliver, are authorized to act. n33 In addition, the State's authorized agent knows precisely when the deprivation of the liberty interest to be free from criminal prosecution will occur -- the moment that the charges are filed. n34 Therefore, as with arrest or imprisonment, the State is capable of providing a reasoned predeprivation

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

determination, at least ex parte, prior to the commencement of criminal proceedings. n35 See *Zinerman v. Burch*, 494 U.S. at 136-139. Failure to do so, or to do so in a meaningful way, see *supra*, at 298-300, is constitutionally unacceptable. n36 [***150] Thus, notwithstanding the possible availability of a state tort action for malicious prosecution, § 1983 provides a federal remedy for the constitutional violation alleged by petitioner. *Monroe v. Pape*, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961) ("The federal remedy is supplementary to the [*315] state remedy, and the latter need not be first sought and refused before the federal one is invoked") (overruled in part not relevant here, *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 664-689, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).

-----Footnotes-----

n32 This case is thus distinguishable from *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), in which petitioner alleged that a prison guard intentionally destroyed his property. *Id.*, at 533 (holding that the Due Process Clause is not violated by random and unauthorized intentional deprivations of property "until and unless it provides or refuses to provide a suitable post deprivation remedy").

n33 See n.14, *supra*.

n34 The Parratt doctrine is also inapplicable here because it does not apply to cases in which the constitutional deprivation is complete when the tort occurs. *Zinerman v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) (citing *Daniels v. Williams*, 474 U.S. 327, 338, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (STEVENS, J., concurring in judgments)); see *supra*, at 313.

n35 See, e. g., *Gerstein v. Pugh*, 420 U.S. at 114 (holding that the Fourth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest").

n36 See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-437, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982).

-----End Footnotes-----

The remedy for a violation of the Fourteenth Amendment's Due Process Clause provided by § 1983 is not limited, as JUSTICE KENNEDY posits, *ante*, at 285, to cases in which the injury has been caused by "a state law, policy, or procedure." One of the primary purposes of § 1983 was to provide a remedy "against those who representing a State in some capacity were unable or unwilling to enforce a state law." *Monroe v. Pape*, 365 U.S. at 175-176 (emphasis in original). Therefore, despite his suggestion to the contrary, *ante*, at 285, JUSTICE KENNEDY's interpretation of Parratt is in direct conflict with both the language and the purposes of § 1983. See *Monroe v. Pape*, 365 U.S. at 172-187.

Section 1983 provides a federal cause of action against "every person" who under color of state authority causes the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Parratt doctrine is reconcilable with § 1983 only when its application is limited to situations in which no constitutional violation occurs. In the context of certain deprivations of property, due process is afforded -- and therefore the Constitution is not violated -- if an adequate post deprivation state remedy is available in practice to provide either the property's prompt return or an equivalent compensation. See *Bonner v. Coughlin*, 517 F.2d at 1320. In other contexts, however, including criminal cases and most cases involving a deprivation of liberty, the deprivation is complete, and

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

the Due Process Clause has been violated, when the [**835] loss of liberty occurs. n37 In those contexts, any post deprivation [*316] state procedure is merely a remedy; because it does not provide the predeprivation process that is "due," it does not avoid the constitutional violation. In such cases, like this one, § 1983 provides a federal remedy regardless of the adequacy of the [***151] state remedy. *Monroe v. Pape*, 365 U.S. at 183.

-----Footnotes-----

n37 Postdeprivation procedures may provide adequate due process for deprivations of liberty in limited circumstances. See, e. g., *Zinemon v. Burch*, 494 U.S. at 132 ("In situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake . . . or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, post deprivation remedies might satisfy due process"); *Daniels v. Williams*, 474 U.S. at 342 (STEVENSON, J., concurring in judgments) (noting that Parratt could defeat a procedural due process claim that alleged a deprivation of liberty when "a predeprivation hearing was definitionally impossible"); *Ingraham v. Wright*, 430 U.S. 651, 701, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (STEVENSON, J., dissenting) (disagreeing with the Court's holding that the State's post deprivation remedies for corporal punishment in the schools satisfied the Due Process Clause, but noting that "a post deprivation remedy is sometimes constitutionally sufficient").

-----End Footnotes-----

IX

The Court's judgment of affirmance is supported by five different opinions. Significantly, none of them endorses the reasoning of the Court of Appeals, and none of them commands a majority. Of greatest importance, in the aggregate those opinions do not reject my principal submission: the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime.

I respectfully dissent.

REFERENCES:

15 Am Jur 2d, Civil Rights 19, 286, 287; 16A Am Jur 2d, Constitutional Law 810, 816; 52 Am Jur 2d, Malicious Prosecution 53, 109, 118, 123; 68 Am Jur 2d, Searches and Seizures 5, 50, 218

6 Federal Procedure, L Ed, Civil Rights 11:257, 11:268

5 Federal Procedural Forms, L Ed, Civil Rights 10:102, 10:109, 10:155, 10:216

22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 121, 126

7 Am Jur Proof of Facts 2d 181, Malicious Prosecution

15 Am Jur Trials 555, Police Misconduct Litigation--Plaintiff's Remedies; 38 Am Jur Trials 493, Defense of a Police Misconduct Suit

USCS, Constitution, Amendments 4, 14; 42 USCS 1983

L Ed Digest, Appeal 1673; Constitutional Law 832, 854; Search and Seizure 32

L Ed Index, Civil Rights and Discrimination; Malicious Prosecution; Probable Cause; Search and Seizure

510 U.S. 266, *; 114 S. Ct. 807, **;
127 L. Ed. 2d 114, ***; 1994 U.S. LEXIS 1319

ALR Index, Civil Rights and Discrimination; Due Process; Malicious Prosecution; Probable Cause; Search and Seizure

Annotation References:

What constitutes "seizure" within meaning of Federal Constitution's Fourth Amendment--Supreme Court cases. 100 L Ed 2d 981.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS 1983) providing private right of action for violation of federal rights. 43 L Ed 2d 833.

Actionability of malicious prosecution under 42 USCS 1983. 79 ALR Fed 896.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

WILLIAM AVERY, APPELLANT, v. HPCS, INC., APPELLEE.
No. 00-CV-1315

DISTRICT OF COLUMBIA COURT OF APPEALS

818 A.2d 175; 2003 D.C. App. LEXIS 138

February 6, 2003, Submitted
March 13, 2003, Decided

PRIOR HISTORY: Appeal from the Superior Court of the District of Columbia. (CA-280-98). (Hon. A. Franklin Burgess, Jr., Trial Judge).

DISPOSITION: [**1] Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant debtor sought review of a decision of the Superior Court of the District of Columbia, which granted summary judgment in favor of appellee creditor in the debtor's action alleging defamation, intentional infliction of emotional distress (IIED), and harassment stemming from collection practices. A similar complaint alleging nearly the same claims had previously been litigated and resolved between the parties.

OVERVIEW: The parties were involved in a relationship in which the creditor attempted to collect an overdue balance on leased dental equipment. The debtor filed a civil action alleging defamation, IIED, and violation of the District of Columbia Human Rights Act, D.C. Code Ann. § 1-2501 (1981). In response, the creditor filed a counterclaim for the overdue balance. A verdict was returned for the debtor, however, judgment for the creditor was also entered on the counterclaim in nearly the same amount. The debtor later instituted a second complaint against the creditor, citing the same incident and its adverse effect on a credit report. The trial court granted summary judgment for the creditor and the court found no error. The debtor's repetitive presentation of his second case was the basis for the trial court's ruling that claim preclusion or res judicata barred the second case. The critical facts surrounding the debtor's debt had been litigated, determined, and reduced to judgment after full opportunity to be heard. The amount of the arrearage was not disputed and had been decided adversely to the debtor. Thus, judgment for the creditor was proper.

OUTCOME: The court affirmed the decision of the trial court.

CORE TERMS: summary judgment, credit report, issue preclusion, theory of liability, disputed, actually litigated, intentional infliction of emotional distress, counterclaim, derogatory, overdue, owed, fair opportunity, suffered injury, final judgment, matter of law, misstep, defamed, sworn, factual basis, civil action, unpaid debt, defamation, harassment, defamatory, questioned, refinance, asserting, opposing, lawsuit, joined

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Summary Judgment: Burdens of Production & Proof

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN1] In reviewing the grant of a motion for summary judgment under D.C. Super. Ct. R. Civ. P. 56, a reviewing court must view the record and asserted facts in a light most favorable to the non-moving party. Under the rule, the non-movant must counter material allegations of fact with sworn assertions of specific facts to avoid summary resolution. Conclusory allegations are not enough to establish a genuine issue of material fact.

Civil Procedure: Preclusion & Effect of Judgments: Res Judicata

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel

[HN2] The doctrine of claim preclusion or res judicata prevents a plaintiff from relitigating the same claim or any claim that might have been raised in the first proceeding. Issue preclusion renders conclusive in the same or subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.

COUNSEL: Everald F. Thompson was on the brief, for appellant.

Robert W. Mance was on the brief, for appellee.

JUDGES: Before TERRY and SCHWELB, Associate Judges, and PRYOR, Senior Judge. Opinion for the court by Senior Judge PRYOR. Dissenting opinion by Associate Judge SCHWELB.

OPINIONBY: PRYOR

OPINION: [*176] PRYOR, Senior Judge: After judicial resolution of an earlier civil action regarding the leasing of dental equipment involving the same parties as are presently before the court in the instant appeal, a motion for summary judgment was granted in the trial court in favor of appellee in response to a second complaint filed by appellant, asserting virtually the same causes of action as before, arising from the same dispute. We affirm.

I.

(A)

Appellant filed a civil action against appellee in August 1995 alleging [**2]defamation, intentional infliction of emotional distress, and violation of the District of Columbia Human Rights Act. n1 The case arose out of events surrounding appellee's attempts to collect an overdue balance regarding the lease of equipment from appellee. In response, appellee filed a counterclaim for the overdue balance. Following a trial, a jury returned a verdict on July 30, 1997 in favor of appellant for \$8,000.00. On August 7, 1997 the court, however, entered judgment in favor of appellee in the amount of \$7,834.94 on the counterclaim. Neither party appealed.

-----Footnotes-----

n1 D.C. Code § 1-2501 (1981).

-----End Footnotes-----

In January 1997, six months before the jury trial in the pending case, appellant attempted to refinance his house. Appellant learned at this time that his credit report reflected an unpaid debt to appellee. Appellant testified during trial that he owed a sum of money on the leased equipment and had not made the payments. The information regarding appellant's delinquency remained on his credit[**3] report until 1999, although the overdue balance was satisfied subsequent to the entry of the judgments in July and August.

On January 13, 1998, appellant filed a second complaint against appellee, again alleging defamation and intentional infliction of emotional distress. He also alleged harassment. n2 He asserts in the latter complaint that appellee was the cause of inaccurate entries in his credit report in January 1997, pending the earlier trial, resulting in financial injury to him at that time.

-----Footnotes-----

n2 D.C. Code § 22-504 (b) (1981).

-----End Footnotes-----

(B)

In the main, the trial judge concluded that appellant's assertions in the present case were governed by the doctrine of "issue preclusion." n3 The judge noted:

. . . Plaintiff has testified under oath that, as of July, 1997, his debt to the defendant was unpaid. More importantly, the Court in the first litigation determined, after a full and fair opportunity to be heard, that the plaintiff owed the defendant \$7,834.94. This finding was essential[**4] to a determination of defendant's counterclaim, it was embodied in a final judgment, and the issue was actually litigated. Thus, under the doctrine of issue preclusion, plaintiff is now barred from asserting in this litigation that he did not have an unpaid debt to the defendant at the time of the credit report. . . . Plaintiff's claim for intentional infliction of emotional distress also must fail. To prove that claim, the [*177] plaintiff must prove among other things that the defendant's conduct in making the information available for inclusion in the credit report was 'extreme and outrageous conduct.' *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 935 (D.C. 1995). If the information was true, as the Court held as matter of law it was, then defendant's conduct could not have been extreme and outrageous. . . . For reasons discussed above, defendant's conduct in this case cannot as a matter of law be the predicate for a harassment claim.

-----Footnotes-----

n3 See *Washington Medical Center v. Holle*, 573 A.2d 1269, 1283 (D.C. 1990).

-----End Footnotes-----

[**5]

Accordingly, the trial judge granted the motions for summary judgment as to all three claims, on the basis of issue preclusion, and this appeal followed.

II.

Appellee's motion to the court presented familiar questions of summary judgment. Super. Ct. Civ. R. 56. [HN1] In reviewing the grant of such a motion, it is settled that a reviewing court must view the record and asserted facts in a light most favorable to the non-moving party. *Sayan v. Riggs Nat'l Bank of Washington, D.C.*, 544 A.2d 267, 268 (D.C. 1988). It is similarly true, under the rule, that the non-movant must counter material allegations of fact with sworn assertions of specific facts to avoid summary resolution. *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2001). "Conclusory allegations are not enough to establish a genuine issue of material fact." *Id.*

In the instant case, appellant alleges in his second complaint that "derogatory information" caused him to pay a higher interest rate in order to refinance his residence in January 1997. There is no other allegation of this kind in his complaint. In response to a second motion for summary relief, appellant then asserted, in opposition[**6] to the motion, that the "derogatory information" remained in his report even after the "disputed monies were paid." Noticeably missing from appellant's opposition are any sworn averments of facts relating to the failure to remove the satisfied debt from the report causing any subsequent specific resultant injuries.

Appellant's repetitive presentation of his second case is at center of the trial judge's ruling. [HN2] The doctrine of claim preclusion or *res judicata* prevents a plaintiff "from relitigating the same claim or any claim that might have been raised in the first proceeding." *Washington Med. Ctr. v. Holle*, 573 A.2d 1269, 1281 (D.C. 1990). Issue preclusion renders conclusive in the same or subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties . . . ; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.

Id. at 1283.

Notwithstanding the sense of grievance which appellant expresses in this second action, we conclude the[**7] trial judge did not err in granting summary judgment because the critical facts surrounding the debt were actually litigated, determined and reduced to judgment after full opportunity to be heard. Appellant, without acknowledging the outcome of the first litigation, has created a revised theory of liability delving back to issues already decided. The amount of the lease arrearage is not now disputed, nor was it disputed at trial. That question has been adjudicated adversely against him. With regard to subsequent alleged injuries attributable to failure to remove the questioned credit report, appellant has not pled such a theory of liability in his complaint, nor has he [*178] joined issue on a factual basis as to an alleged subsequent injury in opposing summary judgment. At bottom, appellant's pleadings are not only deficient as to allegations of fact, but premised on a theory of liability which evolved as the case progressed. Even under a theory of pleadings and practice which is less than strict, we cannot expect the judge or opposing counsel to remedy the deficiencies for appellant.

We conclude therefore that the trial judge did not err in ruling that summary judgment was warranted in[**8] this case. Accordingly, the judgment on appeal is hereby affirmed.

So ordered.

DISSENTBY: SCHWELB

DISSENT: SCHWELB, Associate Judge, dissenting: I regret that I am unable to agree with the majority's affirmance of the judgment. In my opinion, the effect of the trial court's decision is to treat the earlier lawsuit between the parties as dispositive of events that had not yet occurred at the time of the disposition of that suit. I must therefore respectfully dissent.

I agree with the court that insofar as Dr. Avery's second complaint can be construed as dealing only with the period prior to July 1997 (when Dr. Avery paid for the equipment), his action is barred by the doctrine of issue preclusion (collateral estoppel). I also agree that the second complaint is inartfully drawn and does not reveal that there has been a change of circumstances, namely, that the previous debt has been satisfied.

In his opposition to HPCS' motion for summary judgment, however, Dr. Avery alleged that further, after the judgment had been entered against Plaintiff in July 1997 and the disputed monies were paid, Defendant HPCS continued to report adverse credit information and to improperly report such[**9] information and thereby continued to prejudice Plaintiff and his ability to obtain credit until November 1999 when Defendant HPCS had such derogatory and defamatory information removed from Plaintiff's credit report.

(Emphasis in original.) This allegation about events that occurred in the second half of 1997, in 1998, and in 1999, could not have been precluded by the prior action, because the first case was decided in July 1997. At that time, the alleged continuation of the defamatory reporting of Dr. Avery's credit from July 1997 to November 1999 had not yet happened. The court could not foresee in July 1997 that HPCS would fail for 2 1/2 years to record on its books Dr. Avery's satisfaction of his debt. A fortiori, the court could not determine in advance the legal consequences of HPCS' alleged failure to reflect Dr. Avery's payment of what he had previously owed.

The majority's response to these realities is as follows:

With regard to subsequent alleged injuries attributable to failure to remove the questioned credit report, appellant has not pled such a theory of liability in his complaint, nor joined issue on a factual basis as to subsequent injury in opposing summary[**10] judgment.

It is true that the complaint does not include the central allegation contained in his opposition, and that Dr. Avery has filed no affidavit or other admissible document showing that he suffered injury, after July 1997, as a result of the ensuing 2 1/2 years of erroneous reflection of the status of Dr. Avery's former debt. As to the July 1997 - November 1999 period, however, the defendant has not filed any contrary affidavit either, so the record is limited to the pleadings and Dr. Avery's opposition [*179] to the motion for summary judgment. In my opinion, we should treat that opposition as an elaboration on Dr. Avery's complaint. Although Dr. Avery's counsel would have been well advised to include in his complaint the factual allegations contained in his opposition, our Rules of Civil Procedure, like the Federal Rules,

"reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome" *Conley v. Gibson*, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). It therefore seems to me that under these circumstances, we should not dispose, on the pleadings alone, of a factual allegation that Dr. Avery's [**11] credit was defamed for 2 1/2 years after he satisfied his debt. If his credit was so defamed for so long a period, there is a substantial possibility that he suffered injury.

In the present context, and in the absence of affidavits or similar materials that go beyond the pleadings (at least as to the period in dispute), HPCS' motion for summary judgment is, for all practical purposes, equivalent to a motion for judgment on the pleadings, or to a motion to dismiss for failure to state a claim upon which relief may be granted. For purposes of such a motion, the plaintiff's allegations must be treated as true, *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993), and Dr. Avery is therefore entitled to present his case to a trier of fact. Accordingly, I would reverse the award of summary judgment in HPCS' favor and remand the case for trial.

Even if Dr. Avery's opposition to HPCS' motion of summary judgment is not treated as a de facto amendment of the complaint, it is evident from that opposition that Dr. Avery is now making an allegation regarding post-July 1997 events which is not subject to issue preclusion on the basis of the earlier lawsuit. Under these circumstances, [**12] if the complaint is deemed inadequate because it lacks that allegation, the appropriate disposition is dismissal of the complaint without prejudice, or with leave to amend, rather than summary judgment on the merits. Such a disposition would enable Dr. Avery to submit relevant allegations to a fact-finder, so long as these allegations were timely made, and will avoid deciding the case on the basis of counsel's misstep in pleading. n1

-----Footnotes-----

n1 In that regard, I express no opinion as to whether a new or amended complaint would relate back, or as to whether Dr. Avery's new claim would be time-barred.

-----End Footnotes-----

KEVIN AYALA, APPELLANT, v. EVIE L. WASHINGTON, APPELLEE.
No. 92-CV-1553

DISTRICT OF COLUMBIA COURT OF APPEALS

679 A.2d 1057; 1996 D.C. App. LEXIS 146

February 28, 1995, Argued
July 25, 1996, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the District of Columbia. (Hon. Arthur L. Burnett, Sr., Trial Judge).

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff airline pilot commenced a defamation action against defendant, his former girlfriend, requesting compensatory and punitive damages for statements the girlfriend made to the pilot's employer and the Federal Aviation Administration (FAA). After judgment was entered for the pilot on the jury's verdict, the Superior Court of the District of Columbia entered judgment for the girlfriend as a matter of law. The pilot appealed.

OVERVIEW: A jury found that the pilot had shown by a preponderance of the evidence that his girlfriend falsely told the pilot's employer and the FAA that the pilot used marijuana during his off-duty hours. The jury awarded the pilot nominal compensatory and punitive damages. Nevertheless, the trial court entered judgment for the girlfriend, finding that the accusation was a "matter of public concern." On appeal the issues were whether the pilot was a "public figure;" whether the statements were "a matter of public concern;" and what showing of falsity was required. The court held that: (1) the pilot could not be considered a public figure because he did nothing to assume a public role regarding that the matter of public concern. (2) the trial court erred in setting aside the jury's award of compensatory damages because the jury found that the pilot had shown all three elements of defamation by at least a preponderance of the evidence; and (3) the trial court erred in precluding the pilot from introducing evidence bearing on punitive damages, including evidence of his attorney fees and costs because such evidence was admissible as a factor in assessing punitive damages.

OUTCOME: The court reversed the trial court's judgment setting aside the jury's award in favor of the pilot and remanded the case for further proceedings quantifying punitive damages.

CORE TERMS: punitive damages, falsity, clear and convincing evidence, defamation, First Amendment, matter of public concern, compensatory damages, public figure, constitutional malice, plurality, preponderance, speaker, interrogatory, regulation, public concern, reputation, pilot, defamatory, proven, matter of law, accusation, nominal, presumed, fault, award of compensatory, public issues, compensatory, airline, constitutional protection, commercial speech

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Trials: Bench Trials

Civil Procedure: Appeals: Standards of Review: Standards Generally

[HN1] In determining what a jury found, a reviewing court will, if possible, reconcile the jury's responses, consistent with the instructions given.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] The First Amendment restricts the power of government to stifle speech by limiting the channels of communication available to speakers or by controlling the content of communication. The restrictions on governmental power in those areas depend, ironically, on the content of the speech. Some communications are not entitled to any constitutional protection as speech. Included in that unprotected category are falsehoods and obscenity. The First Amendment also imposes lesser restrictions on government regulation of certain categories of speech than others. For example, nonmisleading commercial speech may be restricted upon a lesser showing of governmental interest than noncommercial speech.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN3] Although falsehoods are not entitled to constitutional protection against government regulation, the Supreme Court has recognized that allowing government unfettered power to damnify a speaker on account of her false statements, even at the instance of a private litigant suing for defamation, could result in would-be speakers being inhibited from engaging in constitutionally-valuable speech. Therefore, before a speaker may be penalized for false statements, a party seeking to recover damages for defamation must show the existence of certain facts to a requisite degree of certainty.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN4] There are four factors to be determined in the universe of First Amendment defamation law: the kind of speech, the facts that must be proven, the certainty of proof required, and the type of damages. A determination whether a particular speech is the kind that merits constitutional protection depends upon whether the subject of the speech is a public official or figure, or, if a private person, whether the speech is on a matter of public or private concern. The facts that may need to be proven are falsity and some degree of fault. The permissible degrees of proof range from a presumption in favor of the claimant to a showing by clear and convincing evidence. The type of damages allowed, whether to compensate for proven injury or presumed or punitive in nature, depends on combinations of the preceding three factors. In general, the closer speech comes to the core of the First Amendment, the higher the burden of proof required before the government may hold the speaker legally responsible for the consequences of the speech.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Civil Procedure: Jury Trials: Province of Court & Jury

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN5] In the context of First Amendment defamation law, whether a plaintiff is a public official or public figure is a question of law for the court to determine.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN6] Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Civil Procedure: Jury Trials: Province of Court & Jury

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN7] Whether a statement addresses a matter of public concern is a question of law.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN8] In the context of First Amendment defamation law, whether a statement addresses a matter of public concern must be determined by its "content, form and context."

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN9] Not all speech is of equal First Amendment importance.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN10] Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. In contrast, speech on matters of purely private concern is of less First Amendment concern.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge freedom of public speech or any other freedom protected by the First Amendment.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN12] Where defamatory remarks relate to the conduct of an individual's business affairs, they are essentially private in nature and the protection against presumed damages should not apply.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN13] In the context of First Amendment defamation law, the balance should be struck in favor of a private plaintiff where his reputation has been injured by a non-media defendant in a purely private context.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN14] Where speech concerns the conduct of government or important issues of self-governance, there is a grave danger that those who make and apply the rules at a given time--the governing majority of the moment--will undervalue criticism of the status quo in relation to the reputations of those who represent it. Thus, it is important that the balance in connection with such issues be struck in favor of protection of speech--and against undue government regulation of speech--through the more permanent device of the Constitution. Therefore, such matters are properly treated as of "public concern," and speakers are protected by the First Amendment from the inhibition that they inadvertently may run afoul of defamation laws.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN15] Where a matter is one that affects the interests of all, there is less danger that the value of defamatory speech will be inadequately weighed by the government in the balance against reputation. Applied to an airline safety concern, where the issue is the safety of all and the reputations of a few, it is more likely that the risk of inhibited speech will be overvalued in relation to the risk that damage to the reputations of a few will go unvindicated. Moreover, the danger to public safety posed by various nongovernmental actors is one that is subject to significant change over time. Thus, it is more appropriate in that context to use the usual decision-making processes of government to determine which risks should be reduced at the expense of others. Such matters are therefore properly treated as being of "private concern" and speakers are properly subject to the regulation of defamation laws.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN16] To ensure that true speech on matters of public concern is not deterred, the risk that the available evidence is unpersuasive as to truth or falsity must be assigned to the plaintiff in a defamation action. The risk is sufficiently managed if the plaintiff is required to show falsity by a preponderance of the evidence, without need to make a showing by clear and convincing evidence.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN17] Where a jury in a defamation action has determined that the defendant's conduct has been proven, by clear and convincing evidence, to constitute constitutional malice, no greater certainty is necessary with respect to falsity than proof by a preponderance of the evidence.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Damages: Punitive Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN18] Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. The reprehensible conduct that is sought to be punished and deterred in a defamation action is speaking with constitutional malice, that is, with actual knowledge of the falsity of the speech or reckless disregard of it. Once a defendant has done that, it is mere fortuity if what was said should happen to turn out to be true. What is punished is the creation of an unwarranted risk, not the actual harm that results from the risk.

Torts: Damages: Punitive Damages

[HN19] Under the law of the District of Columbia, although there must be a basis for compensatory damages before punitive damages will be considered, a plaintiff need not prove anything more than nominal actual damages to justify the imposition of punitive damages. Moreover, any constitutional limitation on an award of punitive damages relates not only to actual damages, but to the injury that could have flowed from the conduct.

Torts: Damages: Punitive Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN20] In the context of punitive damages for defamation, the courts reject the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.

Torts: Damages: Punitive Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

Civil Procedure: Relief From Judgment: Additurs & Remittiturs

[HN21] In the context of punitive damages for defamation, the courts do not draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable ratio between punitive and compensatory damages that fits every case. However, a general concern of reasonableness properly enters into the constitutional calculus. In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on that basis.

Torts: Damages: Punitive Damages

[HN22] In the District of Columbia, evidence of the plaintiff's attorney fees and costs is admissible as a factor in assessing punitive damages.

COUNSEL: Paul H. Zuckerberg for appellant.

Robert J. Jones for appellee.

JUDGES: Before TERRY and RUIZ, Associate Judges, and MACK, Senior Judge.

OPINIONBY: RUIZ

OPINION: [*1059] RUIZ, Associate Judge: This case requires us to decide the meaning of the First Amendment's injunction against laws "abridging the freedom of speech, or of the press" in the context of an action for defamation. A jury found that appellant Kevin Ayala, an airline pilot, had shown by a preponderance of the evidence that his former lover, appellee Evie Washington, falsely told Ayala's employer and the Federal Aviation Administration that he had used marijuana during his off-duty hours. The jury also found that Ayala had shown by clear and convincing evidence that Washington either knew her accusation was false or acted with reckless disregard for its truth[**2] or falsity. The jury awarded Ayala nominal compensatory and punitive damages. Nevertheless, the trial court entered judgment for Washington, finding Ayala's showing insufficient under the First Amendment to sustain any judgment against Washington because the accusation made against him was on a "matter of public concern." Although we agree that Washington's communication to the FAA was on a "matter of public concern," we hold that Ayala's showing met the standard required by the First Amendment for the award of compensatory and punitive damages. Thus, the trial court erred in setting aside the award of nominal compensatory damages and in refusing to permit Ayala to present evidence relevant to fixing the amount of punitive damages. Accordingly, we reverse and remand for a new trial on the question of punitive damages.

I.

When the parties met, Ayala was a commercial airline pilot and Washington worked in an administrative position for the Central Intelligence Agency. As a result of their mutual interest in aviation, they became partners in the ownership of

a small plane and eventually also romantically involved. Neither relationship, however, provided lasting rewards to the parties. [**3] Sometime after their personal relationship ended, but during the troubled course of their proprietary relationship, Washington wrote to the FAA and to Ayala's employer alleging that Ayala had engaged in several acts of misconduct, including the use of marijuana while off duty.

In a letter dated April 24, 1990, addressed to Ayala's employer, Washington asserted that she "knew [Ayala] used marijuana." She also wrote,

I would hate to see all USAIR pilots or any commercial pilots get a bad reputation because of one person. I know most of the general public still suspect that drugs were the real reason for USAIR carrier crashing off the end of the runway in New York. I'm trying to keep my friends and family from accidentally creating more bad publicity and suspicion of your pilots by talking to the wrong people about [Ayala's] behavior.

Another letter, dated May 16, 1990, was sent to the FAA. In it, Washington acknowledged receiving a letter from the FAA, which apparently discounted accusations she had made earlier against Ayala. She wrote, in part,

I respect and take FAA [regulations] seriously. I thought that all FAA officials were serious about the[**4] FAA [regulations], and I did not realize, until now, that FAA officials play favoritism with certain individuals. [*1060] I'm sorry that I thought that anyone who knowingly and deliberately violates the FAA [regulations], uses marijuana, and has had other FAA violations, would be the bad guy. But you all are making him into a saint, but I forgot he's an airline pilot and a man. I'm just a nonessential woman and lowly government employee. So [Ayala] is congratulated for violations and probably is being helped to cover up his violations, and I'm condemned and called crazy.

A third letter, dated October 9, 1990, was addressed to the chairman of the board of Ayala's employer. In it, Washington reiterated her earlier allegations of drug use and other violations of FAA regulations. Near the close of the letter, Washington said,

I know it is too much to ask for you to get [Ayala] to become responsible and mature enough to correct the grave injustice and stress that he has caused me. But I plead and pray that you will take the necessary action to save the lives of unsuspecting passengers that board[] the [aircraft] that [Ayala] is in charge of.

Ayala was never[**5] disciplined as a result of Washington's accusations, which the FAA and his employer determined to be unfounded.

Ayala commenced this defamation action requesting compensatory and punitive damages; Washington counterclaimed for abuse of process. In its pretrial order, the court directed Ayala not to mention his claim for punitive damages during his opening statement and forbade him from introducing evidence of Washington's net worth and his attorney fees unless and until the jury found in his favor regarding liability.

At trial, a dispute arose regarding Ayala's burden of proof. Debate focused on whether Washington's statements were on a "matter of public concern." The trial judge thought that they were, and that a higher standard of clear and convincing evidence, rather than a preponderance of evidence, was required. Because the trial judge was uncertain, however, he solicited jury findings under both standards and devised a special interrogatory form that he believed would create a complete appellate record. Neither party objected to the form. As completed by the jury, the form reads as follows:

1. Do you, the jury, find that Kevin Ayala, has established his cause of action [**6]for defamation by clear and convincing evidence?

Yes _____ No X

2. Do you, the jury, find that Kevin Ayala, has established his cause of action for defamation by a preponderance of the evidence?

Yes X No _____

3. If you answered either or both of the questions above, "Yes" proceed to the next question. What sum of money do you award to the Plaintiff, Kevin Ayala, as compensatory damages in this case?

\$1.00

4. If you answered Questions 1 and/or 2 "Yes" in addition to compensatory damages, including nominal compensatory damages, you may also award punitive damages, if you find punitive damages to be justified. What sum of money do you award to the Plaintiff, Kevin Ayala, as punitive damages, if any, in this case?

\$1.00

5. On Evie L. Washington's Counterclaim for Abuse of Process, how do you the jury find?

For Evie L. Washington, Counterclaim Plaintiff _____

For Kevin L. Ayala, Counterclaim Defendant X

6. If you find for Evie L. Washington, Counterclaim Plaintiff, what sum of money do you find will reasonably compensate her for her[**7] damages?

\$ _____

In its instructions, the trial court defined the term, "cause of action for defamation," referred to in the first two interrogatories, as proof of a false, defamatory statement and [*1061] publication of the statement by the defendant with actual malice. n1

-----Footnotes-----

n1 The trial court instructed the jury with respect to each element of defamation:

. . . A defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of or from association or dealing with that person, words charging another with the commission of a criminal act are actionable in and of themselves unless . . . the statement at the time it was made was qualifiedly privileged. And I would explain to you later what qualified privilege means.

. . . Publication of a statement means that the statement is communicated to and understood by a person other than the plaintiff;

. . . Actual malice . . . is defined as the publication by the defendant with knowledge that they were false; that is, that the statements were false or the statements were in reckless disregard of whether they were false or not.

Reckless disregard is shown if the defendant actually entertained serious doubts about the truth of the statements when she published them. In determining whether the statements defamed the plaintiff, Kevin Ayala, you are to consider how the statements appeared to have been meant by the defendant, Evie L. Washington, and how it was understood by those to whom they were communicated.

-----End Footnotes-----

[**8]

With respect to punitive damages, the trial court instructed the jury that it could only award such damages upon a finding

that [Washington] acted with knowledge of the falsity of the communication or with reckless disregard as to whether the statements were true or false. The party seeking punitive damages must establish the grounds for punitive damages by clear and convincing evidence.

After judgment was entered for Ayala on the jury's verdict, Washington moved for judgment as a matter of law. Ayala sought a trial on his claim for punitive damages, including an opportunity to present evidence concerning his expenditures on attorney fees and costs. The trial court granted Washington's motion, ruling that because the defamatory material involved a matter of public concern, Ayala was required to prove all elements of his case by clear and convincing evidence. The trial court denied Ayala's motion on the same ground and on the alternative ground that "in view of the nominal compensatory damages award, there was little or no evidence to justify a punitive damages award, even as to the \$1.00 award."

II.

We review the trial court's action by determining, first, what[**9] the jury found and, second, whether such findings satisfy the legal requirements for award of compensatory and punitive damages in a defamation action. Turning, first, to what the jury found, we look at what it was asked to decide. The first two interrogatories concerning establishment of Ayala's "cause of action for defamation" were compound -- the jury had to find three facts: falsity, publication, and constitutional malice. The first interrogatory asked whether these facts had been proven by clear and convincing evidence, the second interrogatory inquired whether they had been proven by a preponderance of the evidence. If the jury failed to find any one fact to have been established with the requisite certainty, under the instructions the jury was required to give a negative answer to that interrogatory. An affirmative answer would mean that the jury found all three facts to have been established with the requisite certainty. Interrogatory number four asked only one question, whether punitive damages were justified. The jury had been instructed that, for punitive damages to be justified, the jury had to find that Ayala had established constitutional malice by clear and convincing[**10] evidence.

[HN1] In determining what the jury found, we will, if possible, reconcile the jury's responses, consistent with the instructions given. *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 765-66 (3d Cir. 1990) (holding that court is constitutionally required to accept verdict if there is any view of case under which responses may be reconciled); see also 5A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* P 49.04 at 49-62 (2d ed. 1996) (noting that failure to object to verdict on grounds of inconsistency operates as waiver of objection). Thus, reconciling the jury's findings, we know that because the jury awarded punitive damages, the jury found constitutional malice by clear and convincing [*1062]evidence. The jury's negative response to the first interrogatory must mean, therefore, that it did not find either falsity or publication -- or both -- to have been shown by clear and convincing evidence. Its affirmative response to the second interrogatory, on the other hand, means that the jury found that falsity and publication had been established by at least a preponderance of the evidence. Having determined what the jury found, we turn to a discussion of the applicable legal[**11] standards.

III.

[HN2] The First Amendment restricts the power of government to stifle speech by limiting the channels of communication available to speakers or by controlling the content of communication. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (content); *Regan v. Time, Inc.*, 468 U.S. 641, 648, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984) (content and channels); *Members of the City Council of L.A. v. Taxpayers for Vincent*,

466 U.S. 789, 804, 812, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (same). The restrictions on governmental power in those areas depend, ironically, on the content of the speech. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 n.5, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) (citing cases). Some communications are not entitled to any constitutional protection as speech. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 n.5, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985) (noting that obscene speech and "fighting words" have no First Amendment protection). Included in that unprotected category are falsehoods and obscenity. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) ("There is no constitutional value in false statements of fact."); *Roth v. United States*, 354 U.S. 476, 485, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) (obscene speech). The First Amendment also imposes lesser restrictions on government regulation of certain categories of speech than others. *Dun & Bradstreet*, supra, 472 U.S. at 758 n.5. For example, nonmisleading commercial speech may be restricted upon a lesser showing of governmental interest than noncommercial speech. Compare, e.g., *Central Hudson*, supra, 447 U.S. at 566 (requiring that restrictions on commercial speech directly advance substantial government interest) with *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657-58, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990) (holding that statute burdening political speech must be justified by compelling state interest) and *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989) (holding that regulation of indecent telephone message services had to be narrowly tailored to serve compelling government interest). But see *44 Liquormart, Inc. v. Rhode Island*, 134 L. Ed. 2d 711, 116 S. Ct. 1495, 1508-09 (1996) (citing *Central Hudson*, but emphasizing that ban on commercial speech^[**13] advertising liquor prices should be reviewed with "special care" and be upheld only if it is shown to "significantly reduce alcohol consumption").

[HN3] Although falsehoods are not entitled to constitutional protection against government regulation, the Supreme Court has recognized that allowing government unfettered power to damnify a speaker on account of her false statements, even at the instance of a private litigant suing for defamation, could result in would-be speakers being inhibited from engaging in constitutionally-valuable speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 279, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Therefore, the Court has held that before a speaker may be penalized for false statements, the party seeking to recover damages for defamation must show the existence of certain facts to a requisite degree of certainty. *Id.*

[HN4] There are four factors to be determined in the universe of First Amendment defamation law: the kind of speech, the facts that must be proven, the certainty of proof required, and the type of damages. See *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 771-79, 89 L. Ed. 2d 783, 106 S. Ct. 1558 ^[*1063] (1986). ⁿ² A determination whether a particular speech is the kind that merits constitutional^[**14] protection depends upon whether the subject of the speech is a public official or figure, or, if a private person, whether the speech is on a matter of public or private concern. *Id.* at 773-75. The facts that may need to be proven are falsity and some degree of fault. The permissible degrees of proof range from a presumption in favor of the claimant to a showing by clear and convincing evidence. *Id.* The type of damages allowed, whether to compensate for proven injury or presumed or punitive in nature, depends on combinations of the preceding three factors. In a series of cases the Supreme Court has set out some of the requirements imposed by the First Amendment before a speaker can be held legally responsible for the speech. In general, the closer speech comes to the core of the First Amendment, the higher the burden of proof required before the government may hold the speaker legally responsible for the consequences of the speech. ⁿ³

-----Footnotes-----

ⁿ² The Supreme Court has not ruled on whether a fifth factor exists: whether the defendant is properly characterized as a member of the media. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 779 n.4, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986). This court has concluded, however, that the First Amendment recognizes no such distinction. *Moss v. Stockard*, 580 A.2d 1011, 1022-23 n.23 (D.C. 1990); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 783-84, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (Brennan, J., dissenting) (noting that six Members of the Court agreed that rights of the media and non media defendants are the same).

^[**15]

n3 Thus far, the Supreme Court has established the following constitutional requirements, depending on the kind of speech and the type of damages requested.

Damages compensatory presumed/punitive fact proof fact proof public official or falsity ? falsity ?

public figure constitutional constitutional malice c/ca malice c/ca private person/ falsity p/pb falsity ?

public concern constitutional fault p/pc malice c/cc

private person/ falsity ? falsity ?

private concern

fault ? faultd ?

(Key: "c/c" means clear and convincing evidence; "p/p" means preponderance of the evidence; a question mark indicates that the Supreme Court has not yet decided the issue.)

a New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (requiring proof of constitutional malice by clear and convincing evidence, but silent as to burden regarding falsity).

b Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986) (requiring that private figure plaintiff bear burden of showing falsity of statement on matter of public concern before recovering compensatory damages).

c Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) (permitting states to award damages for actual injury upon proof of fault where plaintiff is private figure, but requiring constitutional malice be shown by clear and convincing evidence as prerequisite to award of presumed or punitive damages).

d Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985) (no majority opinion) (holding that presumed and punitive damages could be awarded to private figure plaintiff on the basis of a negligently-made, false, defamatory statement on a matter of only private concern, without a showing of constitutional malice by clear and convincing evidence).

-----End Footnotes-----

[**16]

In this case, the jury found that Ayala had shown constitutional malice by clear and convincing evidence, but had otherwise established the other two elements of his claim, falsity and publication, only by a preponderance of the evidence. Applying the legal [*1064] requirements that the Court has heretofore established n4 to the jury's findings in this case, the trial court's grant of judgment as a matter of law in favor of Washington on the issue of compensatory damages can be sustained only if Ayala is a public figure and falsity must be proved by clear and convincing evidence. If Ayala is not a public figure, we would have to reverse the judgment on compensatory damages; we could still sustain judgment as a matter of law denying punitive damages were we to hold that Washington's statements were on a matter of public concern and that falsity must be proved by clear and convincing evidence. Thus, we address those three potentially dispositive issues.

-----Footnotes-----

n4 See supra note 3.

-----End Footnotes-----

A.

Is Ayala a "public figure"? [HN5] [**17]

Whether a plaintiff is a public official or public figure is a question of law for the court to determine. *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990). Our independent examination of the record in light of Supreme Court precedent satisfies us that Ayala is not a public figure. In *Gertz*, supra, the Court stated that "absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 352. The focus is on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* In *Gertz*, the plaintiff was a private lawyer who played a peripheral role in a controversy concerning the criminal prosecution of a police officer. *Id.* The Court ruled that because *Gertz* did not "thrust himself into the vortex of the public issue, nor did he engage the public's attention in an attempt to influence its outcome," *Gertz* could not be deemed a public figure. *Id.*

Ayala has not thrust himself into the vortex of any controversy concerning drug use by pilots, nor has he [**18] in any sense engaged the attention of the public. The Court's holding in *Hutchinson v. Proxmire*, 443 U.S. 111, 61 L. Ed. 2d 411, 99 S. Ct. 2675 (1979), confirms that Ayala is not a public figure. In *Hutchinson*, the plaintiff was a scientist who received federal grants to conduct research to measure stress in animals by the tension in their jaws. Senator Proxmire awarded a "Golden Fleece" award mocking Hutchinson's work. Suing for defamation, Hutchinson contended that Proxmire's newsletter and television statements regarding the award mischaracterized his research. The Court held that Hutchinson was not a public figure, *id.* at 135-36, stating, [HN6] "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135. Nor was a general concern about public expenditures enough to make Hutchinson a public figure. *Id.* Because Hutchinson at no time thrust himself into view or assumed any role of public prominence, he was not a public figure. *Id.*

By virtue of his position, like Hutchinson, Ayala potentially affected a matter of public concern; but also like Hutchinson, Ayala did nothing to assume a public role regarding that [**19] concern. Consequently, Ayala cannot be considered a public figure. n5 To the extent that the trial court's grant of judgment as a matter of law vacated the jury's award of compensatory damages, it must be reversed, and the jury's award of \$1.00 in compensatory damages, reinstated.

-----Footnotes-----

n5 In *Moss v. Stockard*, 580 A.2d 1011 (D.C. 1990), we used a three-part test set out by the United States Court of Appeals for the District of Columbia Circuit in *Waldbaum v. Fairchild Publications*, 201 U.S. App. D.C. 301, 627 F.2d 1287, cert. denied, 449 U.S. 898, 66 L. Ed. 2d 128, 101 S. Ct. 266 (1980), as a "road map through the terrain of Supreme Court precedent on [the] point [of who is a public figure]." 580 A.2d at 1030. We noted in *Moss* that the touchstone was whether the plaintiff had assumed a role in society that invites attention and comment. *Id.* Because it is clear that the present case is controlled by *Hutchinson* and that Ayala did not assume any role of prominence in society, we have no need of the "road map" supplied by *Waldbaum*.

-----End Footnotes-----

[**20]

B.

Were the statements "a matter of public concern"?

[HN7] Whether a statement addresses a matter of public concern is a question of law. See *Dun & Bradstreet, Inc.*, supra, 472 U.S. at 761-62 [*1065] (plurality opinion); see also *Connick v. Myers*, 461 U.S. 138, 148 n.7, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983) ("The inquiry into the protected status of speech is one of law, not fact."). In *Dun & Bradstreet*, the plurality said that [HN8] whether a statement addressed a matter of public concern had to be determined by its "content, form and context." 472 U.S. at 761 (quoting *Connick*, supra, 461 U.S. at 147-48).

We distinguish between matters of public concern and those of private concern in light of the reason that the Supreme Court has given in support of the distinction. The plurality in *Dun & Bradstreet* explained the reason for the distinction

as resting on the Court's "long recognition that [HN9] not all speech is of equal First Amendment importance." 472 U.S. at 758. The plurality stated that its

special concern for speech on public issues is no mystery: The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the[**21] people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that [HN10] speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.

In contrast, speech on matters of purely private concern is of less First Amendment concern. As a number of state courts . . . have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case, there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.

Id. at 759-60 (footnotes, citations, internal quotations and alterations omitted).

In light of the lessened constitutional interest in purely private speech, the plurality said that a different balance was appropriate between the risk that some speech will be inhibited and the opportunity of states to[**22] fashion rules to protect reputations and compensate damage to them. Id. at 760-61 & n.7. The two concurrences in *Dun & Bradstreet* each agreed that less protection for speech without "public importance" was appropriate. Id. at 764 (Burger, C.J., concurring); id. at 774 (White, J., concurring).

The *Dun & Bradstreet* contrast of speech about "political and social changes," "public affairs," "self-government," and "public issues" with speech of "purely private concern" shows that the focus of the phrase "matters of public concern" is not on speech that might be of popular interest because it captures the attention of the public based on its sensational or human interest aspects, but is instead on speech of constitutional interest because it relates to the ordering of government and society at large. This approach is consistent with *Gertz*, supra, where the Court expressly rejected any test that turns on a judicial determination of whether the content of the defamatory statement attracted public interest. 418 U.S. at 346 (rejecting plurality approach in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), which would have had protection turn on a determination[**23] that the statement was a matter of "public or general interest"); see also *Rosenbloom*, supra, 403 U.S. at 63-64 (Harlan, J., dissenting) (arguing that majority went too far in applying *New York Times* to "private libels that arise out of events found to be of 'public or general concern.'"); id. at 78-79 (Marshall, J., dissenting) (same)); see also *Harley-Davidson Motorsports v. Markley*, 279 Ore. 361, 568 P.2d 1359, 1362 (Ore. 1977) (recognizing *Gertz*'s rejection of plurality approach in *Rosenbloom*). In rejecting the *Rosenbloom* plurality approach, the *Gertz* [*1066] Court reasoned that, on the one hand, a private individual would have no recourse if the publication concerned a matter that happened to be popular or of general interest; thus, the *Rosenbloom* plurality test was under-protective of the private figure. Id. On the other hand, the uncertainty of determining what is of popular interest would

insufficiently protect the publisher, who would be left to the mercy of the common law if it misjudged the issue. Id. Thus, *Gertz*, like *Dun & Bradstreet*, rejects any distinction in constitutional protection based on what may happen to capture public attention[**24] and what does not. n6

-----Footnotes-----

n6 For this reason, we think that the approach exemplified in some cases, which seeks to identify those issues in which the public has an interest -- as opposed to those which are of public importance -- is inconsistent with both the Supreme Court's rulings and the logic underlying the imposition of constitutional restrictions on the substance of legislation. See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990) (holding that television network commentator's derogatory statement concerning plaintiff's product was matter of public concern because it "was of general interest and was made available to the general public [and] protection of statements about product effectiveness will ensure that

debate on public issues will be uninhibited, robust and wide-open" (internal quotations, citations, and alterations omitted)), cert. denied, 499 U.S. 961, 113 L. Ed. 2d 650, 111 S. Ct. 1586 (1991); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 686 (4th Cir. 1989) (holding that where defendant's statements analyzed financial health of banks, including the plaintiff, "because of the obvious importance of banks to the financial health of our communities and the historic government interest in the operations and solvency of these institutions, we have no difficulty concluding that Veribanc's statements relate to a matter of public concern."); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988) ("The defamatory speech [which concerned an alleged conspiracy among powerful interest groups in the American jai alai industry] clearly addresses matters with which the public has a legitimate concern. The public is legitimately interested in all matters of corruption, particularly when the corruption involves gambling in a highly-regulated industry and the effects of the corruption could cost taxpayers and the many members of the general public who patronize the industry millions of dollars."); *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 271 Cal. Rptr. 30, 37 (Ct. App. 1990) (holding that newsletter's false report that plaintiff had sexually assaulted woman addressed matter of public concern because "the topic here is not solely in the individual interest of the speaker and its specific business audience. To the contrary, sexual harassment and violence against women is of pressing public concern."); *Rabren v. Straigis*, 498 So. 2d 1362, 1363 (Fla. Dist. Ct. App. 1986) ("We conclude that the statements allegedly made by defendant in this case involved a matter of public concern. In this part of the country it is well known, and commonly a subject of media coverage, that the performance of harbor pilots in guiding seagoing vessels is a matter of concern not only for the safety of the vessels but for the public in general."); *Dougherty v. Boyertown Times*, 377 Pa. Super. 462, 547 A.2d 778, 784 (Pa. Super. Ct. 1988) (holding that letter to newspaper falsely accusing chiropractor of overcharging addressed matter of public concern because by adopting law regulating chiropractic practice, "the legislature has implicitly stated that the quality of chiropractic services rendered in this Commonwealth is a matter of public concern"); see also *Vern Sims Ford, Inc. v. Hagel*, 42 Wash. App. 675, 713 P.2d 736, 741 (Wash. Ct. App. 1986) (holding that flyers falsely accusing a car dealer of dishonest practices constituted "private business dispute," not matter of public concern); *Sartain v. White*, 588 So. 2d 204, 213 (Miss. 1991) ("Accusations [concerning murder, robbery and terrorism] generally are a matter of public concern . . ."); *Staheli v. Smith*, 548 So. 2d 1299, 1304-05 (Miss. 1989) (holding that statements made in course of decision process concerning grant of academic tenure to particular individual not of public concern because it "was essentially an employment dispute" and "occurred in a very confidential setting and had a very limited audience").

-----End Footnotes-----

[**25]

The foregoing distinction comports with the Court's holdings in the three cases in which it decided whether speech concerning a private figure was of public or private concern. In *Gertz*, supra, the speech of public concern criticized the criminal prosecution of a police officer. 418 U.S. at 326-27. In *Hepps*, supra, the speech of public concern alleged that a businessman had corruptly influenced public officials to give him favorable regulatory treatment. 475 U.S. at 769. In *Dun & Bradstreet*, supra, on the other hand, the speech of private concern related to the financial status of a small company, disseminated to the company's creditors for the purpose of informing their decisions in business dealings. 472 U.S. at 751-52. The determining factor in these three cases is whether or not the speech addressed the conduct of government. In the two cases where it did, *Gertz* and *Hepps*, the Court determined that the speech was a "matter of public concern."

Three state-court decisions cited favorably by the *Dun & Bradstreet* plurality also illustrate the point. In *Denny v. Mertz*, 106 Wis. 2d 636, [*1067] 318 N.W.2d 141 (Wis.), cert. denied, 459 U.S. 883, 74 L. Ed. 2d 147, 103 S. Ct. 179 (1982), the court held[*26] that a statement made by the defendant to a reporter in an interview about a stockholder dispute concerning a private company was not entitled to special protection under *Gertz*. Id. at 143, 153. The court quoted from Justice Goldberg's concurrence in *New York Times*:

[HN11]

"Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge freedom of public speech or any other freedom protected by the First Amendment."

Id. at 153 (quoting *New York Times*, supra, 376 U.S. at 301-02 (Goldberg, J., concurring)).

In *Harley-Davidson Motorsports, supra*, the Oregon Supreme Court held that Gertz protections did not apply in an action for defamation based on a letter written by the plaintiff's competitor to their common franchisor that reported that the plaintiff had poorly served a customer. 568 P.2d at 1361, 1364. The court reasoned,

In the present case the interest in democratic dialogue is non-existent. The defamatory matter does not contribute to the free exchange of ideas in decision making for a self-governing society. When this interest[**27] supporting First Amendment speech is removed, the only interests left, when weighed against the states' protection of a private individual's reputation, call for a conclusion that the free speech guarantee does not require interference with the states' interest in providing redress for defamation. The Supreme Court of the United States has never indicated in this context that constitutional curtailment of state actions was necessary to protect free speech interests.

Id. at 1364.

Finally, in *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (Colo. 1978), the court held that [HN12] where "the defamatory remarks related to the conduct of an individual's business affairs," they were "essentially private in nature" and the protection afforded by Gertz against presumed damages should not apply. *Id.* at 84. Like the court in *Denny*, the court in *Rowe* quoted Justice Goldberg's concurrence in *New York Times* and held that [HN13] "the balance should be struck in favor of the private plaintiff where his reputation has been injured by a non-media defendant in a purely private context." *Id.* at 84-85.

Although the foregoing cases speak of "striking a balance" between the risk that truthful speech[**28] on a particular topic will be inhibited and the risk that injury to reputation will go uncompensated and undeterred, our threshold decision is in essence a decision about who shall strike that balance. If we decide that the First Amendment protects the defamatory statements in this case, then the decision will have been made -- the balance struck -- at the most fundamental level of national legislation through the Constitution. If we decide, however, that First Amendment protection does not apply to the defamation claim in this case, then we permit the ordinary law-making organs of state and national government to strike the balances they think are best suited to the times and places over which they exercise jurisdiction. Thus, we pause to consider what factors should affect our decision about who should decide.

[HN14] Where speech concerns the conduct of government or important issues of self-governance, there is a grave danger that those who make and apply the rules at a given time -- the governing majority of the moment -- will undervalue criticism of the status quo in relation to the reputations of those who represent it. Thus, it is important that the balance in connection with [**29]such issues be struck in favor of protection of speech -- and against undue government regulation of speech -- through the more permanent device of the Constitution. Therefore, such matters are properly treated as of "public concern," and speakers are protected by the First Amendment from the inhibition that they inadvertently may run afoul of defamation laws.

[HN15] Where the matter is one that affects the interests of all, on the other hand, there is less danger that the value of defamatory speech will be inadequately weighed by the [*1068] government in the balance against reputation. Applied to the airline safety concern alleged in this case, where the issue is the safety of all and the reputations of a few, it is more likely that the risk of inhibited speech will be overvalued in relation to the risk that damage to the reputations of a few will go unvindicated. Moreover, the danger to public safety posed by various nongovernmental actors is one that is subject to significant change over time. Thus, it is more appropriate in that context to use the usual decision-making processes of government to determine which risks should be reduced at the expense of others. Such matters are therefore properly[**30] treated as being of "private concern" and speakers are properly subject to the regulation of defamation laws.

In view of the foregoing, we conclude that the content of Washington's letters to Ayala's employer was of private concern, and subject to defamation law, but that the content of her letter to the FAA was incidental to allegations of public concern, and therefore protected by the Constitution. Washington's letters to Ayala's employer merely communicated information regarding the alleged misconduct of a single private individual, albeit misconduct that could have a significant effect on public safety. The allegations did not, however, address any issue concerning the conduct of government or the structure of society or any social issue. There is little danger that government, acting through defamation law, will improperly weigh the social interest in communication of such information against the reputation interest of the subject of such communications. Indeed, for the reasons discussed above, where the subject matter is the safety of all, the weighing is best done through the ordinary processes of government, which are able to respond to shifts

in the social value of the competing[**31] interests, whether they are caused by changes in circumstances or popular mood. In fact, the interest in airline safety implicated by Washington's communication to Ayala's employer are precisely the sort that are best evaluated and regulated through the usual non-constitutional legislative and judicial processes, because the interests at stake are shared across society. n7

-----Footnotes-----

n7 Washington's challenge to the judgment was solely on constitutional grounds. She did not assert that Ayala's claim was contrary to statutory or common law. Thus, we do not address that issue.

-----End Footnotes-----

Washington's letter to the FAA is of a different character, however. In it, she criticizes the FAA's handling of her accusations. She asserts that the agency's failure to give credence to her charges is the result of discrimination against her as a woman and as a non-elite. Such speech is at the very core of the First Amendment; the fact that it was directed to a government agency instead of to the public at large merely brings it within an even[**32] more specific clause of the First Amendment -- that which prohibits laws "abridging . . . the right . . . to petition the Government for a redress of grievances." Because Washington's letter to the FAA concerned such grievances, addressed to an agency of the government, we hold that it was on a matter of public concern.

C.

What showing of falsity was required?

Having determined that some of the defamatory statements were a matter of public concern and others were not, we now must decide what kind of showing with respect to falsity (a preponderance of the evidence or clear and convincing evidence) Ayala had to make with respect to each kind of speech to support the award of compensatory and punitive damages.

In *Hepps*, supra, the Court addressed the question whether to recover compensatory damages, a private-figure plaintiff bore the burden of proving falsity as well as fault where the defamatory speech was of public concern. See 475 U.S. at 776-78. The Court approached the problem by reasoning that the allocation of the burden of proof distributed between the parties the risk that the available evidence was unpersuasive as to truth or falsity. See *id.* at 776.[**33] The Court held that [HN16] "to ensure that true speech on matters of public concern is not deterred," the risk had to be assigned to the plaintiff in a defamation action. *Id.* at 776-77. [*1069] The Court held, in the context of compensatory damages, that the risk was sufficiently managed if the plaintiff was required to show falsity by a preponderance of the evidence, without need to make a showing by clear and convincing evidence. *Id.* Applying *Hepps* to the present case, we hold that the trial court erred in setting aside the jury's award of compensatory damages because the jury found that Ayala, a private figure in a case involving matters of public as well as private concern, had shown all three elements of defamation by at least a preponderance of the evidence.

The Supreme Court has not yet ruled on the question whether a private-figure plaintiff must show falsity by clear and convincing evidence to recover punitive damages. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989); *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 742 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 134 L. Ed. 2d 666, 116 S. Ct. 1567 (1996). The present case squarely [**34]presents us with the question of Ayala's entitlement to punitive damages. Looking to the Court's analysis in *Hepps* for guidance, we first note that Ayala, unlike *Hepps*, has shown by clear and convincing evidence that the defendant acted with constitutional malice. To decide how persuasive the evidence of falsity must be for the plaintiff to prevail, we are guided by the purpose of punitive damages. In these circumstances [HN17] where a jury has determined that the defendant's conduct has been proven, by clear and convincing evidence, to constitute constitutional malice, we do not think that any greater certainty is necessary with respect to falsity than proof by a preponderance of the evidence.

[HN18] Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz*, supra, 418 U.S. at 350. The reprehensible

conduct that is sought to be punished and deterred is speaking with constitutional malice, that is, with actual knowledge of the falsity of the speech or reckless disregard of it. Once a defendant has done that, it is mere fortuity if what was said should happen to[**35] turn out to be true. What is punished is the creation of an unwarranted risk, not the actual harm that results from the risk. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 2721, 125 L. Ed. 2d 366 (1993) (plurality opinion) (stating that any constitutional limitation on award of punitive damages relates not only to actual damages, but to injury that could have flowed from conduct); see also *id.* at 2725 (Kennedy, J., concurring in the judgment) (endorsing "objective indicia of reasonableness" discussed by plurality); *id.* at 2734 (O'Connor and White, JJ., concurring in the judgment) ("I have no quarrel with the plurality that, in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant's anticipated gain."); cited with approval in *BMW of N. Am., Inc. v. Gore*, 134 L. Ed. 2d 809, 116 S. Ct. 1589, 1602 (1996).

Although it is appropriate to require proof of falsity as a check on vexatious lawsuits concerning circumstances in which no cognizable harm could accrue to the plaintiff, once that hurdle has been passed, there is no constitutional concern requiring greater certainty of proof with respect to falsity. Of course, [**36] just as "[a] jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false," *Hepps*, supra, 475 U.S. at 778, a jury is more likely to find proof of constitutional malice by clear and convincing evidence if it is shown by similarly persuasive evidence that the statement was false. Thus, "our decision [affects] only marginally . . . the burdens that the plaintiff must already bear as a result of [the Court's] earlier decisions in the law of defamation." *Id.*

IV.

As an alternative ground for granting judgment as a matter of law on punitive damages, the trial court cited the fact that the jury awarded Ayala only nominal compensatory damages. The trial court was incorrect [*1070] in basing its judgment on that fact. [HN19] Under the law of the District of Columbia, although there must be a basis for compensatory damages before punitive damages will be considered, *Street v. Hedgepath*, 607 A.2d 1238, 1248 n.9 (D.C. 1992) (citing *Vassiliades v. Garfinckel's*, 492 A.2d 580, 593 (D.C. 1982)) a plaintiff need not prove anything more than nominal actual[**37] damages to justify the imposition of punitive damages. *Robinson v. Sarisky*, 535 A.2d 901, 907 (D.C. 1988). Moreover, as noted above, any constitutional limitation on the award of punitive damages relates not only to actual damages, but to the injury that could have flowed from the conduct, see *TXO Prod. Corp.*, supra, 113 S. Ct. at 2724 (affirming West Virginia Supreme Court of Appeals holding that "defendant could be liable for punitive damages, even if the jury did not award the plaintiff any compensatory damages"), as well as the reprehensibility of that conduct. *BMW of N. Am.*, supra, 116 S. Ct. at 1599 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.") (citation omitted). Although Washington's statements did not result in Ayala losing his job or suffering any other government or employer sanction, they were of such a nature as to create a significant risk of consequences of that magnitude, and they were proven to have been made with constitutional malice. The jury award of \$1.00 in punitive damages, equal to the award of \$1.00 in compensatory damages is[**38] not, on its face, suspect, and may reflect no more than the jury's predicament in the absence of evidence going to punitive damages. As the Supreme Court recently noted,

Of course, [HN20] we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. *TXO*, 509 U.S. at 458 Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: [HN21] 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enters[**39] into the constitutional calculus.'" *TXO*, 509 U.S. at 458 In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U.S. at 482. . . . (O'Connor, J., dissenting).

BMW of N. Am., Inc., supra, 116 S. Ct. at 1602-03. Therefore, the trial court's grant of judgment as a matter of law on punitive damages cannot be sustained on any alternative ground.

Conclusion

The trial court erred in requiring Ayala to make a stronger showing to establish his claim to compensatory and punitive damages from Washington. Therefore, its judgment must be reversed. Furthermore, the trial court precluded Ayala from introducing evidence bearing on punitive damages, including evidence of his attorney fees and costs. [HN22] In this jurisdiction, such evidence is admissible as a factor in assessing punitive damages. *Town Ctr. Management Corp. v. Chavez*, 373 A.2d 238, 246 (D.C. 1977). Therefore, the case must be remanded for [*1071] further proceedings quantifying punitive damages.

Reversed [**40] and remanded.

BRENDA G. BEETON AND DENNIS BEETON, APPELLANTS, v. DISTRICT OF COLUMBIA, et al.,
APPELLEES.
No. 95-CV-1101

DISTRICT OF COLUMBIA COURT OF APPEALS

779 A.2d 918; 2001 D.C. App. LEXIS 191

June 12, 2001, Argued
August 30, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the District of Columbia. (Hon. Curtis E. von Kann, Trial Judge).

DISPOSITION: The trial court's judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, employee and her husband, filed an action against appellees, the District of Columbia and District employees, alleging, inter alia, defamation, loss of consortium, and wrongful termination. The Superior Court of the District of Columbia entered judgement for the appellees and the appellants sought review.

OVERVIEW: A District of Columbia Department of Corrections employee was placed in charge of the control center at the facility where she worked but she was removed after an article appeared in the facility's newsletter which suggested that she received the position because she had connections others did not. The employee claimed that she was humiliated by the article, that she became depressed, and that her marriage deteriorated as a result. The trial court found that the article was false and defamatory, but also found that the employee was a public official and could not recover because she did not prove that the article was published with actual malice. The appellate court held that (1) the employee was a public official at the time the article was published and that she was required to present clear and convincing evidence of actual malice by those responsible for its publication to sustain her burden of proof; and (2) the trial court had properly refused to award unliquidated damages on the employee's claim against the District of Columbia for wrongful termination because she had not provided the District with notice of her claim, pursuant to D.C. Code Ann. § 12-309.

OUTCOME: The trial court's judgement was affirmed.

CORE TERMS: actual malice, public official, newsletter, defamatory, unliquidated damages, defamation claim, assigned, publisher, wrongful termination, defamation, editor, reckless disregard, corporal, clear and convincing evidence, bidding process, falsity, notice, roster, prevail, duty, staff members, entertained, female, morale, staff, evidence presented, defamation action, correction, administrator, assault and battery

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Discrimination: Disparate Treatment
[HN1] With a few exceptions, the District of Columbia Comprehensive Merit Personnel Act (CMPA), D.C. Code Ann. § 1-601.1 et seq., is the exclusive remedy for a District of Columbia employee who has a work-related complaint of any kind. However, not all defamation actions necessarily fall within the CMPA.

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review
Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN2] In a case tried without a jury, the District of Columbia Court of Appeals addresses legal issues de novo, but the trial judge's findings of fact can be reversed only if they are plainly wrong or without evidence to support them. D.C. Code Ann. § 17-305.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN3] In the District of Columbia, a statement is defamatory if it tends to injure the plaintiff in his trade, profession, or community standing or lower him in the estimation of the community. A plaintiff bringing a defamation action must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN4] In *New York Times*, the United States Supreme Court declared that constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The Court held that the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN5] A corrections officer employed by the District of Columbia government is a public official.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN6] Proof of defamation and falsity alone affords an insufficient basis for recovery by a public employee. A public employee plaintiff must prove publication with actual malice by clear and convincing proof in order to establish the defendant's liability. In addition, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. To satisfy the reckless disregard standard, a plaintiff has to establish that the defendant in fact entertained serious doubts as to the truth of the publication or that they actually had a high degree of awareness of its probable falsity.

Labor & Employment Law: Wrongful Termination: Defenses

[HN7] D.C. Code Ann. § 12-309 applies to actions for unliquidated damages to persons or property, and compliance with the § 12-309 notice rule is mandatory. An employee who fails to provide the requisite notice may not successfully claim unliquidated damages relating to her wrongful termination action.

Governments: State & Territorial Governments: Claims By & Against

[HN8] See D.C. Code Ann. § 12-309.

COUNSEL: Dennis Beeton, Pro se, with whom Brenda G. Beeton, Pro se, was on the brief, for appellants.

Mary T. Connelly, Assistant Corporation Counsel, with whom Robert R. Rigsby, Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel, and Lutz Alexander Prager, Assistant Deputy Corporation Counsel, were on the brief, for appellees.

JUDGES: Before TERRY, STEADMAN and REID, Associate Judges.

OPINIONBY: REID

OPINION: [*920]

REID, Associate Judge: In this case, appellants, Mrs. Brenda Beeton and her husband Mr. Dennis Beeton, employees of the District of Columbia Department of Corrections ("DOC"), challenge the trial judge's decision in favor of appellees, the District of Columbia ("the District"), Leon Hammond, and Vincent Gibbons, on their claims for defamation, loss of consortium, and wrongful discharge. [**2] Mrs. Beeton argues that the trial court erroneously concluded that: (1) she was a public official and therefore had to prove actual malice to prevail on her defamation claim,

and (2) the unliquidated damages she sought for wrongful termination were unrecoverable. n2 She also argues that the evidence warranted damages in excess of \$60,000. n3

-----Footnotes-----

n1 Mrs. Beeton is no longer employed with the DOC.

n2 The appellants initially filed a six-count complaint, alleging negligence; intentional infliction of emotional and physical distress; assault and battery; defamation; loss of consortium; and wrongful termination. Mr. Beeton's claim for assault and battery against defendant/District employee Fred Hedge was dismissed for lack of personal jurisdiction. Mrs. Beeton's claim for intentional infliction of emotional and physical distress was dismissed, along with the unliquidated damages portion of the wrongful termination claim, for failure to give the District notice under D.C. Code § 12-309 (1995).

n3 The trial court calculated the damages that appellants would receive on their defamation claim, if this court reversed its judgment on appeal, as \$60,000 (\$50,000 for Mrs. Beeton and \$10,000 for Mr. Beeton). Since we sustain the trial court's judgment, appellants are not entitled to damages relating to their defamation action.

-----End Footnotes-----

[**3]

We hold that as a District corrections officer, Mrs. Beeton was a public official at the time the defamatory article appeared; hence, she had to prove actual malice on the part of those responsible for its publication, that is, that the article was published "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 280, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Since Mrs. Beeton did not sustain her burden of proof by presenting clear and convincing evidence of actual malice, we affirm the judgment of the trial court.

FACTUAL SUMMARY

The record on appeal shows the following facts. Mrs. Beeton began working for the DOC around August 1986, and in 1989 was stationed at the DOC Modular Facility at Lorton, Virginia ("the Facility") where the incidents giving rise to this lawsuit occurred. She was a correctional officer, and was commonly addressed as "Corporal." In August 1989 she was named the Officer in Charge ("OIC") of the Facility's Control Center (Shift No. 2) through the Master Roster system. n4

-----Footnotes-----

n4 The Master Roster System Committee, consisting of the institutional major, three shift captains and the assistant administrator of DOC, assigned officers to particular positions for a six-month period. Correctional officers would bid for positions, and the committee established a Master Roster list of assignments. If there were no bids, as in the case of the OIC vacancy which Mrs. Beeton filled, the committee selected a qualified person. The officer who was normally assigned to the OIC post was on extended sick leave, and his relief officer was on military leave.

-----End Footnotes-----

[**4] [*921]

Mrs. Beeton had the necessary experience for the OIC position, and was given the assignment. She functioned satisfactorily until she was removed in October 1989, after the publication of an article in The Modular Circular, a Facility-created newsletter, which implied that she had received the position through a connection. However, after she filed a complaint in the trial court challenging her removal, the trial judge concluded that Mrs. Beeton's "removal was not based on any just cause related to her performance of duties," and that "she was replaced by a less experienced officer"

At trial on her defamation and wrongful termination claims, Mrs. Beeton asserted that she was humiliated as a result of the article, and became depressed and withdrawn. Her marital relationship also deteriorated, and she lost the ability to be intimate with her husband. She sought therapy, and was diagnosed with general anxiety disorder. From her perspective, the article implied that she received the post in an "illicit" manner, and thus, her reputation was tainted as a consequence. She took time off from work n5 and was terminated in September 1991 for being absent without official leave. She [**5] was reinstated in May 1992, however, and awarded back pay as well as benefits.

-----Footnotes-----

n5 Mrs. Beeton initially took time off from her job because a letter of commendation from the FBI, addressed to her husband and expressing gratitude for his help with certain arrests, fell into the hands of an inmate. The letter was a photocopy and was not in a sealed envelope. She became fearful that her involvement, and that of her husband, with the FBI was no longer confidential. She became terrified at the prospect of returning to work. Her doctor and her therapist instructed her to remain at home, which she did for an extended period.

-----End Footnotes-----

ANALYSIS

The Defamation Claim

Mrs. Beeton's primary argument on appeal is that the trial court erroneously concluded that she was a public official for the purposes of her defamation action, and therefore had to prove actual malice. n6 The District maintains that the article was not defamatory, and even assuming that it was, the trial court correctly concluded that Mrs. Beeton[**6] was a public official who failed to satisfy her burden of proof.

-----Footnotes-----

n6 The District contends for the first time on appeal that appellants' claims are precluded by the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-601 et seq. This court has previously held that [HN1] "with a few exceptions, the CMPA is the exclusive remedy for a District of Columbia employee who has a work-related complaint of any kind." Robinson v. District of Columbia 748 A.2d 409, 411 (D.C. 2000) (citing Stockard v. Moss, 706 A.2d 561, 564 (D.C. 1997)). However, "not . . . all defamation actions necessarily fall within the . . . CMPA." Stockard, supra, 706 A.2d at 565 n.9 (D.C.1997). Based on our review of the record on appeal, it is not obvious that we lack jurisdiction in this matter. Therefore, we consider the merits of the arguments presented by the parties.

-----End Footnotes-----

"Our standard of review is well established. [HN2] In a case tried without a jury, we address legal issues de novo,[**7] but the judge's findings of fact can be reversed only if they are 'plainly wrong or without evidence to support [them].'" Jemison v. National Baptist Convention, USA, Inc., 720 A.2d 275, 281 (D.C. 1998) (quoting D.C. Code § 17-305 (a) (1997)) (other citations omitted). The appellate record reveals the following factual background pertinent to our review of Mrs. Beeton's defamation claim. In 1989, the administrator of the Facility authorized the publication of a newsletter, called The Modular Circular, to boost employee morale, and allow staff members an opportunity to vent and voice their concerns. The September 5, 1989 issue of the newsletter included an article voicing contempt for [*922] the

Facility's bidding process used to fill certain positions. One paragraph in particular noted that a certain female corporal always received "choice" assignments because of some sort of "Connection to which other [correctional] officers [were] not privy[.]" The article was entitled Teamsters Local 1714 News and read in relevant part:

In response to your recent newsletter article "teamsters Local 1714 News." You asked the question, "how do you[**8] feel about the recent bidding process?" As a Correctional Officer of over five years in the [DOC], not to mention my military work experience of over 10 years, I want to go on record as saying, "I personally believe the bidding process, as it occurred at this Facility, really sucked." Conditions do not appear to have been made better but many officers have expressed how bad things have worsened, having Potential [sic] to send morale to an all time low.

Officers are often heard complaining among themselves about how displeased and upset they are with assignments they bidded [sic] for and didn't get, about assignments given which they never bidded [sic] for at all, and at least one corporal has been "forced to work beneath other officers to whom he is a senior because his Shift Captain maintains "there can be no deviation from the master roster." However, it should also be noted that some officers on their shifts have maintained they never or rarely work the post they were assigned as a result of the bidding process. Where, then, is the consistency that is to exist among shifts?

Several officers have voiced their displeasure regarding management's selection of a female corporal[**9] with less than one year time in grade being assigned daily as OIC of the Modular Facility Control Center for the past two weeks, in the absence of Sgt. J.L. Bryant. They are of the opinion that it would have been more fitting to assign a Sergeant or Senior Corporal to that position. Officers admitted that it appear to them that this Junior Corporal always seem to get "choice" assignments, none of which have (as of this writing) been dormitory or cellblock assignments. Could she perhaps have a "Connection" to which other officers are not privy?

Mrs. Beeton, her husband, and others interpreted the article as implying that she had been given the assignment as a result of preferential treatment. One witness testified that, after reading the article, he and others believed that Mrs. Beeton had provided sexual favors to get the OIC post. The article did not mention Mrs. Beeton by name, but the record supports the trial judge's finding that it was "widely understood by the readership of The Modular Circular" that Mrs. Beeton was its subject; she was the only female corporal assigned daily to the OIC position at that time.

Mrs. Beeton complained to her union representative, the administrator, [**10]her immediate supervisor, and the institutional major for the facility. Her supervisor and union representative both wrote to the editor, rebuking him for the publication. No retraction was requested and none was published. In the follow-up issue, there was more comment on the issue:

So you thought there wouldn't be a newsletter since none were found in the usual place on payday, did you? How wrong could you be! I guess we (the staff) are trying to ascertain what we printed in our last edition that had people stopping [sic] by our office literally begging for copies. Only one person was seen leaving while appearing to be somewhat upset while everyone else was all smiles. If someone out there knows something that we don't, please let us (the staff) know. We enjoy keeping you [*923] informed and we would like to keep you smiling while doing just that. It's wonderful to have an Administrator, such as Mr. John Lattimore, who will allow his employees an avenue to express their feelings. By doing so we believe problems will sometimes surface, as well as viable solutions to those problems, which will ultimately increase the morale and exprit [sic] de corps of the modular Facility, we welcome[**11] all ideas, suggestions, and criticisms without persons being required to give their names. Hope you enjoy this edition as much as the last, but if you don't we expect you to tell us (the staff) what we need to do to make it better.

Mrs. Beeton argues that the article in the newsletter demonstrates culpability and/or gross negligence on the part of the District and its employees, because they were "boasting of the previous defamatory issue's effect." The trial court found that "[Mrs.] Beeton had [not] received preferential treatment in the assignment of her duty posts," that she had the experience for the OIC position, and "was assigned to the OIC position as a result of Master Committee decisions made in the regular course of that Committee's responsibilities." Thus the challenged statements in the newsletter were both "false" and "defamatory."

We now turn to the legal principles applicable to this matter. [HN3] "In the District of Columbia, 'a statement is defamatory if it tends to injure [the] plaintiff in his [or her] trade, profession or community standing or lower him in the estimation of the community'." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000)[**12] (quoting

Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. 1984)). "A plaintiff bringing a defamation action . . . must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." Crowley v. North American Telecomms. Assoc., 691 A.2d 1169, 1173 n.2 (D.C. 1997) (quoting Prins v. International Tel. and Tel. Corp., 757 F. Supp. 87, 90 (D.D.C. 1991)). Here, the trial court concluded that the statements were both false and defamatory.

Nonetheless, the trial court went on to consider another factor critical to the disposition of the defamation claim. [HN4] In *New York Times*, supra, the Supreme Court declared that: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating[**13] to his official conduct unless he proves that the statement was made with 'actual malice'-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The court "held . . . that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." 376 U.S. at 283. See also *Kendrick v. Fox Television*, 659 A.2d 814, 821 (D.C. 1995); *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993). Applying the *New York Times* standard, the trial court found that Mrs. Beeton was not entitled to prevail on her defamation claim because she was a public official and failed to satisfy her burden to prove actual malice on the part of the District and its employees. As the trial judge stated: "There is no evidence that whoever wrote the . . . article had any knowledge that any statements contained in the article were false, nor entertained any serious doubts concerning [*924] the truth of the statements in the article." Nor was there any evidence that the editor or publisher of *The Modular Circular* "harbored[**14] any ill-will or spite toward either of the Beetons, nor had any reason to wish to hurt them."

Mrs. Beeton argues that the trial court did not cite any case law to support its ruling. However, the trial court referred to several cases from other jurisdictions holding that law enforcement officers are public officials. Significantly, in *United States v. Neville*, 317 U.S. App. D.C. 297, 303, 82 F.3d 1101, 1107 (1996), the District of Columbia Circuit held that: [HN5] "[A] corrections officer employed by the District of Columbia government . . . [is] a public official" Similarly, the Court of Appeals of New York concluded that a state correction officer bringing a claim for defamation "was . . . obliged not only to establish that the statement [in a letter] was false, but also prove by clear and convincing evidence that it was published by defendant with 'actual malice.'" *Sweeney v. Prisoners' Legal Servs. of New York*, 84 N.Y.2d 786, 647 N.E.2d 101, 104, 622 N.Y.S.2d 896 (N.Y. (1995) (citations omitted)). At least one other case is instructive. In *St. Amant v. Thompson*, 390 U.S. 727, 730, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968),[**15] the Supreme Court concluded that a deputy sheriff was a public official and had the burden of proving that the statements about his official conduct were made with actual malice. Based on these cases, we hold that Mrs. Beeton was a public official at the time the defamatory article was published, and thus, she was required to present clear and convincing evidence of actual malice by those responsible for its publication, that is, that they published the statements with "knowledge that [they were] false or with reckless disregard for whether [they were] false or not." *New York Times*, supra, 376 U.S. at 280.

Mrs. Beeton failed to present sufficient evidence at trial to show that the article was written and published with knowledge of its falsity. " [HN6] Proof of defamation and falsity alone affords an insufficient basis for recovery[,] . . . plaintiff[] must prove publication with 'actual malice' by 'clear and convincing proof' in order to establish the defendant's liability." *Nader v. Toledano*, 408 A.2d 31, 40 (D.C. 1979). See also *Foretich*, supra, 619 A.2d at 59 ("actual malice' must be proved by clear and convincing evidence") (citations omitted)). [**16] In addition, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant*, supra, 390 U.S. at 731. See also *Sweeney*, supra: "To satisfy the reckless disregard standard, plaintiffs had to establish that defendants in fact entertained serious doubts as to the truth of [the] publication or that they actually had a high degree of awareness of [its] probable falsity." 647 N.E.2d at 104 (citing *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) (other citations and internal quotations omitted)).

The evidence presented at trial showed that the author of the article could have reasonably believed that Mrs. Beeton had a "Connection." Mr. Beeton and Major Spiker, who sat on the Master Roster committee, had gone hunting together; their families had visited each other's homes; and their children had been on an outing together. The Beetons also had a friendly relationship with Captain Willard[**17] Stewart, who sat on the committee. Moreover, we are bound by the

trial court's factual finding that none of the newsletter's staff [*925] members harbored any feelings of ill-will or spite towards Mrs. Beeton.

Despite the trial judge's findings, Mrs. Beeton argues that there was evidence presented at trial that Charles Watts wrote the article and that the editor of The Modular Circular (defendant Vincent Gibbons) and the publisher (defendant Leon Hammond) "knew the statements were false," were "grossly negligent" because they failed to review the article before its publication, neglected to conduct an investigation, and later "boasted of the previous defamatory issue's effect" in the next issue. In fact, Charles Watts was suggested as the possible author, but was never called as a witness to confirm that he wrote the article, and there was no evidence presented to establish any negative relationship between the Beetons and Mr. Watts. Furthermore, both the editor and publisher testified that they did not read the article before it was published because they were preoccupied with their other duties at the Facility. n7 The editor testified that he read the article days after it was published [**18] and believed that the article was a healthy discussion of a matter of public interest within the facility, and the publisher testified that he was a "publisher in name only," and did not review materials submitted for publication. In short, we are satisfied that Mrs. Beeton did not prove actual malice, and thus, cannot prevail on her defamation claim. n8

-----Footnotes-----

n7 Mr. Gibbons, the editor, was also the assistant administrator, and Mr. Hammonds, publisher, was the recreational specialist. Both men were among the group of staff members assigned to the management and operation of the newsletter.

n8 Since Mrs. Beeton cannot prevail in this matter, Mr. Beeton's loss of consortium claim must also fail.

-----End Footnotes-----

The Wrongful Termination Claim

Mrs. Beeton's wrongful termination claim may be disposed of summarily. She challenged the trial court's findings regarding damages. The trial court determined that only liquidated damages could be recovered because the District was not provided with the requisite notice of the claim[**19] under D.C. Code § 12-309. The District argues that Mrs. Beeton was made whole for all her liquidated damages, and that the trial court correctly concluded that § 12-309 bars her recovery for the requested unliquidated damages. The trial court found that the unliquidated damages she demanded for wrongful termination were related to her claim for intentional infliction of emotional distress, which was dismissed before trial for failure to give the District notice under § 12-309. n9 We agree that the damages Mrs. Beeton seeks are unliquidated because they are not "an easily ascertainable sum certain." See *Hartford Accident and Indem. Co. v. District of Columbia*, 441 A.2d 969, 974 (D.C. 1982) (quoting *Kiser v. Hoge*, 170 U.S. App. D.C. 407, 421, 517 F.2d 1237, 1251 (1974)). Furthermore, [HN7] § 12-309 applies to actions for "unliquidated damages to persons or property," see *District of Columbia v. Campbell*, 580 A.2d 1295, 1300 (D.C. 1990), and compliance with the § 12-309 notice rule is mandatory, see *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 436 (D.C. 2000). Mrs. Beeton failed to[**20] provide the requisite [*926] notice, and thus, may not successfully claim unliquidated damages relating to her wrongful termination action.

-----Footnotes-----

n9 [HN8] D.C. Code § 12-309 states:

An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the

injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section.

-----End Footnotes-----

Accordingly, for the foregoing reasons, we affirm the trial court's judgment.

So ordered.

BOARD OF REGENTS OF STATE COLLEGES ET AL. v. ROTH
No. 71-162

SUPREME COURT OF THE UNITED STATES

408 U.S. 564; 92 S. Ct. 2701; 33 L. Ed. 2d 548; 1972 U.S.LEXIS 131; 1 BNA IER CAS 23

January 18, 1972, Argued
June 29, 1972, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 446 F.2d 806, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, a board of regents of state colleges, sought review of a decision from the United States Court of Appeals for the Seventh Circuit, which held that respondent professor was wrongfully terminated from his teaching job in violation of his Fourteenth Amendment right to due process.

OVERVIEW: The professor was hired for his first teaching job as an assistant professor at a state-run university. He was hired for a fixed term of one year and was not re-hired the following year. The professor brought suit against the university alleging that he was denied his Fourteenth Amendment right to due process because the university never gave him a reason for their decision not to re-hire him and further he had no opportunity to challenge their decision at a hearing. The lower court granted summary judgment on the procedural issue and ordered the university to provide the professor with reasons and a hearing. The appellate court affirmed and the board of regents sought review. On review, the Court held that the professor had no protected interest in continued employment, as he had completed his contracted for term, therefore, there could be no Fourteenth Amendment protection. The decision of the lower court and the appellate court was reversed and the case was remanded.

OUTCOME: The Court reversed the lower court's grant of summary judgment in the professor's favor.

CORE TERMS: teacher, First Amendment, notice, tenure, Fourteenth Amendment, nonrenewal, rehire, re-employment, non-retention, rehired, nonretention, public employment, academic year, deprivation, appointment, nontenured, safeguard, continued employment, state university, summary judgment, hired, renewed, eligibility, faculty, constitutional right, withdrawal, academic freedom, board of regents, freedom of speech, free speech

LexisNexis (TM) HEADNOTES - Core Concepts:

Education Law: Departments of Education: State Departments of Education: Authority

[HN1] Wis. Stat. § 37.31(1) provides that all teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after four years of continuous service in the state university system as a teacher.

Constitutional Law: Procedural Due Process: Scope of Protection

[HN2] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

Constitutional Law: Procedural Due Process: Scope of Protection

[HN3] Liberty denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Constitutional Law: Procedural Due Process: Scope of Protection

[HN4] A person is not deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.

Constitutional Law: Procedural Due Process: Scope of Protection

[HN5] The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.

Constitutional Law: Procedural Due Process: Scope of Protection

[HN6] To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Constitutional Law: Procedural Due Process: Scope of Protection

[HN7] Property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

SUMMARY: The respondent was hired in 1968 for his first teaching job as an assistant professor at a state university for a fixed term of one academic year. The notice of his faculty appointment so specified. He completed the academic year, but was informed that he would not be rehired for the next academic year. Under university rules, the respondent was given no reason for the decision not to rehire him, nor was he given any opportunity to challenge the decision at any sort of hearing, because (1) he had acquired no tenure rights to continued employment under state statutory law, such rights inuring to the benefit of state university teachers only after 4 years of year-to-year employment, and (2) absent tenure rights, he was entitled to nothing under state law beyond his one-year appointment. The respondent then brought an action in the United States District Court for the Western District of Wisconsin for declaratory and injunctive relief, alleging that the decision not to rehire him was an attempt to punish him for certain statements he had made that were critical of the university administration in violation of his right to freedom of speech, and that the failure to give him notice of the reason for his nonretention and an opportunity for a hearing was in violation of his right to procedural due process. The District Court granted summary judgment in favor of the respondent on the due process issue only, ordering the university to grant him a hearing and to provide reasons for his nonretention (310 F Supp 972). The United States Court of Appeals for the Seventh Circuit affirmed (446 F2d 806).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Stewart, J., expressing the views of five members of the court, it was held that (1) procedural due process applies only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property, and the range of such interests is not infinite, (2) procedural due process protects only those interests that a person has already acquired in specific benefits, (3) the respondent was in no way deprived of an interest in "liberty," for in declining to re-employ him, the state did not impose on him any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, (4) similarly, the respondent was in no way deprived of an interest in "property," because the terms of his appointment specifically provided that his employment was to terminate at the end of the academic year, and he thus had absolutely no interest protected by the Fourteenth Amendment in re-employment for the next year, (5) the respondent was therefore not constitutionally entitled to a statement of reasons or to a hearing on the decision not to rehire him, and (6) the partial summary judgment should thus not have been granted, because the respondent had not shown that he was deprived of any interest in liberty or property protected by the Fourteenth Amendment.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

Burger, Ch. J., concurred, saying that the point should be underscored that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law, and that it is only when a state-employed teacher has a right to re-employment under state law, arising from either an express or implied contract, that he then, in turn, has a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract.

Douglas, J., dissented, saying that (1) the respondent may have been deprived of constitutional rights if the nonrenewal of his contract by this state university was the result of the respondent's exercise of his First Amendment rights, (2) in order to determine this, the respondent was entitled under the Fourteenth Amendment's due process clause to a statement of the reasons for his discharge and an opportunity to rebut those reasons, which statement he never received, and (3) the court should stay its hand until such academic procedures had been completed.

Brennan, J., joined by Douglas, J., dissented, saying that since the respondent was denied due process when his contract was not renewed and he was not given an opportunity to respond, he was entitled to summary judgment on that issue.

Marshall, J., dissented, saying that (1) federal and state governments and governmental agencies are constitutionally restrained from acting arbitrarily with respect to employment opportunities that they either offer or control, (2) every citizen who applies for a government job is constitutionally entitled to it unless the government can establish some reason for denying the employment, and (3) the respondent was denied due process when his contract was not renewed and he was not informed by the state university of the reasons for the nonrenewal nor given any opportunity to respond.

Powell, J., did not participate.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

nontenured teacher -- nonretention -- reasons --

Headnote:

A nontenured state college teacher, hired for a fixed term of one year, has no constitutional right to a statement of reasons or to a hearing on a university's decision not to rehire him for another year, where no reasons have been given for the decision not to retain the teacher.

[***HN2]

procedural due process -- liberty -- property --

Headnote:

The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property.

[***HN3]

liberty -- property -- right to prior hearing --

Headnote:

When interests involving liberty and property rights protected by the Fourteenth Amendment are implicated, the right to some kind of prior hearing is paramount.

[***HN4]

408 U.S. 564, *, 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

liberty and property -- hearing -- necessity --

Headnote:

Before a person is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property, he must be afforded an opportunity for some kind of a hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

[***HN5]

interests -- procedural due process --

Headnote:

The range of interests protected by procedural due process is not infinite.

[***HN6]

weighing process -- formality -- procedural requisites --

Headnote:

A weighing process is a part of any determination of the form of hearing required in a particular situation by procedural due process, it being permissible for the hearing's formality and its procedural requisites to vary, depending upon the importance of the interests involved and the nature of any subsequent proceedings.

[***HN7]

deprivation of interest -- hearing -- balancing process --

Headnote:

The constitutional requirement of an opportunity for some form of hearing before deprivation of an interest encompassed by the Fourteenth Amendment's protection of liberty and property does not depend upon any narrow balancing process.

[***HN8]

due process requirements -- interest at stake -- nature --

Headnote:

To determine whether due process requirements apply, courts must not look to the "weight," but to the nature, of the interest at stake, to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

[***HN9]

procedural due process -- rights -- privileges --

Headnote:

The applicability of procedural due process rights is not governed by any wooden distinction between "rights" and "privileges."

[***HN10]

procedural due process -- protected property interests --

Headnote:

Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

[***HN11]

liberty -- due process protection --

Headnote:

Due process protection for deprivations of liberty extends beyond the sort of formal constraints imposed by the criminal process.

[***HN12]

procedural due process -- liberty and property -- meaning --

Headnote:

Although the United States Supreme Court eschews rigid or formalistic limitations on the protection of procedural due process, it nevertheless observes certain boundaries, for the words "liberty" and "property" in the due process clause of the Fourteenth Amendment must be given some meaning.

[***HN13]

liberty -- broad meaning --

Headnote:

In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

[***HN14]

nontenured college teacher -- nonrenewal -- notice and hearing --

Headnote:

Where a state, in declining to rehire a nontenured college teacher whose contract of employment which was for a fixed term of one academic year has not been renewed for the following year, makes any charge against the teacher which seriously damages his standing and associations in his community, such as where the state bases the nonrenewal of the teacher's contract on a charge that the teacher is dishonest or immoral, then, because the teacher's good name, reputation, honor, and integrity is at stake because of what the state is doing to him, the state is required by procedural due process to accord to the teacher notice and an opportunity to refute the charges before state university officials.

[***HN15]

nontenured college teacher -- nonrenewal -- notice and hearing --

Headnote:

Where a state, in declining to rehire a nontenured college teacher whose contract of employment which was for a fixed term of one academic year has not been renewed for the following year, imposes on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities, such as where a state bars the teacher from all other public employment in state universities, then, because deprivation not only of present government employment, but also of future opportunity for government employment, is no small injury, the state is required by procedural due process to accord to the teacher notice and an opportunity to refute the charges before state university officials.

[***HN16]

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

professional employment -- state regulation -- prior hearing --

Headnote:

A state, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities in a manner that contravenes due process, nor in a manner that denies the right to a full prior hearing.

[***HN17]

nonretention of job -- deprivation of liberty --

Headnote:

Mere proof that a person's record of nonretention by a state or state agency in one job might make that person somewhat less attractive to some other employers does not--taken alone--establish the kind of foreclosure of opportunities that amounts to a deprivation of "liberty" proscribed by the due process clause of the Fourteenth Amendment.

[***HN18]

free speech or press -- impingement -- hearing --

Headnote:

When a state directly impinges upon interests in free speech or free press, an opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards.

[***HN19]

notice and hearing -- public meetings -- obscene materials --

Headnote:

Fair notice and opportunity for an adversary hearing is required before an injunction is issued against the holding of rallies and public meetings, or before a state makes a large-scale seizure of a person's allegedly obscene books and magazines.

[***HN20]

free speech -- teacher's rights -- state employment --

Headnote:

Whatever may be a teacher's rights of free speech, the interest a teacher has in holding a teaching job at a state university is simply not itself a free speech interest.

[***HN21]

due process -- deprivation of liberty -- nonretention in job --

Headnote:

The concept of procedural due process is stretched too far when it is suggested that a person is deprived of "liberty" when he is simply not rehired in one job, but remains as free as before to seek another.

[***HN22]

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

protection of property -- safeguarding interests -- forms --

Headnote:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits, and these property interests may take many forms.

[***HN23]

procedural due process -- property interest --

Headnote:

To have a property interest in a benefit protected by procedural due process, a person must have more than an abstract need or desire for it, and he must have more than a unilateral expectation of it; in short, he must have a legitimate claim of entitlement to it.

[***HN24]

property claims -- hearing -- vindication --

Headnote:

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, and this reliance must not be arbitrarily undermined; it is a purpose of the constitutional right to a hearing, protected by procedural due process, to provide an opportunity for a person to vindicate those claims.

[***HN25]

property interests -- creation -- state law --

Headnote:

Property interests are not created by the Constitution; rather, they are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

[***HN26]

teacher -- rehiring -- property interest --

Headnote:

Although a nontenured college teacher who is employed at a state university for a period of one academic year, and who is then not retained by the university for the succeeding year, has an abstract concern in being rehired, he does not have a property interest sufficient to require the university authorities to give him a hearing when they decline to renew his contract of employment.

[***HN27]

Constitution -- interpretation --

Headnote:

It is a written Constitution which the United States Supreme Court applies, and its role is confined to interpretation of that Constitution.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

[***HN28]

nontenured college teacher -- nonretention -- summary judgment --

Headnote:

The granting of a summary judgment to a nontenured state college teacher on the ground that he was denied procedural due process when he was not given reasons for the decision of the state university, which employed him for a period of one academic year, not to rehire him for the succeeding year, and was not given an opportunity to refute such reasons, if any, for his nonretention, is improper where the teacher has not shown that he was deprived of some liberty or property right protected by the Fourteenth Amendment.

SYLLABUS: Respondent, hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave a nontenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal," but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for re-employment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. Held: The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of "liberty," and the terms of respondent's employment accorded him no "property" interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 569-579.

COUNSEL: Charles A. Bleck, Assistant Attorney General of Wisconsin, argued the cause for petitioners. With him on the brief were Robert W. Warren, Attorney General, and Robert D. Martinson, Assistant Attorney General.

Steven H. Steinglass argued the cause for respondent. With him on the brief were Robert L. Reynolds, Jr., Richard Perry, and Richard M. Klein.

Briefs of amici curiae urging reversal were filed by Robert H. Quinn, Attorney General, Walter H. Mayo III, Assistant Attorney General, and Morris M. Goldings for the Commonwealth of Massachusetts; by Evelle J. Younger, Attorney General of California, Elizabeth Palmer, Acting Assistant Attorney General, and Donald B. Day, Deputy Attorney General, for the Board of Trustees of the California State Colleges; by J. Lee Rankin and Stanley Buchsbaum for the City of New York; and by Albert E. Jenner, Jr., Chester T. Kamin, and Richard T. Dunn for the American Council on Education et al.

Briefs of amici curiae urging affirmance were filed by David Rubin, Michael H. Gottesman, George H. Cohen, and Warren Burnett for the National Education Association et al.; by Herman I. Orentlicher and William W. Van Alstyne for the American Association of University Professors; by John Litgenberg and Andrew J. Leahy for the American Federation of Teachers; and by Richard L. Cates for the Wisconsin Education Association.

JUDGES: Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Rehnquist, JJ., joined. Burger, C. J., filed a concurring opinion, post, p. 603. Douglas, J., filed a dissenting opinion, post, p. 579. Brennan, J., filed a dissenting opinion, in which Douglas, J., joined, post, p. 604. Marshall, J., filed a dissenting opinion, post, p. 587. Powell, J., took no part in the decision of the case.

OPINIONBY: STEWART

OPINION: [*566] [***554] [**2703] MR. JUSTICE STEWART delivered the opinion of the Court.

408 U.S. 564, *, 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. n1 The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

-----Footnotes-----

n1 The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968." The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "regulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

-----End Footnotes-----

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire [***555] tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing [**2704] beyond his one-year appointment. n2 There are no statutory [*567] or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

-----Footnotes-----

n2 [HN1] Wis. Stat. § 37.31 (1) (1967), in force at the time, provided in pertinent part that:

"All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

-----End Footnotes-----

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures. n3 A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or nonretention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case." n4

-----Footnotes-----

n3 Wis. Stat. § 37.31 (1) further provided that:

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

"No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

n4 The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I -- February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II -- During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

"RULE III -- 'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.

"RULE IV -- When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

-----End Footnotes-----

[*568] In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

***556] The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech. n5 [*569] [**2705]Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

-----Footnotes-----

n5 While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate." 310 F.Supp. 972, 982.

-----End Footnotes-----

***HR1] The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F.Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909. The only

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. n6 We hold that he did not.

-----Footnotes-----

n6 The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. E. g., *Orr v. Trinter*, 444 F.2d 128 (CA6); *Jones v. Hopper*, 410 F.2d 1323 (CA10); *Freeman v. Gould Special School District*, 405 F.2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drown v. Portsmouth School District*, 435 F.2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectancy" of continued employment. *Ferguson v. Thomas*, 430 F.2d 852, 856 (CA5).

-----End Footnotes-----

I

[***HR2] [***HR3] [***HR4] [***HR5] [HN2] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right [*570] to some kind of prior hearing is paramount. n7 But the [***557] range of interests protected by procedural due process is not infinite.

-----Footnotes-----

n7 Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379. "While 'many controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e. g., *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566; *Phillips v. Commissioner*, 283 U.S. 589, 597; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594.

-----End Footnotes-----

[***HR6] [***HR7] [***HR8] The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F.Supp., at 977-979. Undeniably, the respondent's re-employment prospects were of major concern to him -- concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. n8 But, to determine whether [*571] due [**2706] process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. See *Morrissey v. Brewer*, ante, at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

-----Footnotes-----

n8 "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, supra, at 378. See, e. g., *Goldberg v.*

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

Kelly, 397 U.S. 254, 263; *Hannah v. Larche*, 363 U.S. 420. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra*.

-----End Footnotes-----

[***HR9] [***HR10] [***HR11] "Liberty" and "property" are broad and majestic terms. They are among the "great [constitutional] concepts . . . purposely left to gather meaning from experience. . . . They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. n9 The Court has also made clear that the property interests protected by [*572] procedural due process extend well beyond actual ownership of real estate, chattels, or money. n10 [***558] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. n11

-----Footnotes-----

n9 In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey v. Richardson*, 86 U. S. App. D. C. 248, 182 F.2d 46, *aff'd* by an equally divided Court, 341 U.S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374. See, e. g., *Morrissey v. Brewer*, *ante*, at 482; *Bell v. Burson*, *supra*, at 539; *Goldberg v. Kelly*, *supra*, at 262; *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6; *Pickering v. Board of Education*, 391 U.S. 563, 568; *Sherbert v. Verner*, 374 U.S. 398, 404.

n10 See, e. g., *Connell v. Higginbotham*, 403 U.S. 207, 208; *Bell v. Burson*, *supra*; *Goldberg v. Kelly*, *supra*.

n11 "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497, 499. See, e. g., *Stanley v. Illinois*, 405 U.S. 645.

-----End Footnotes-----

[***HR12] Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

[***HR13] "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, [HN3] it denotes not merely [**2707] freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262

408 U.S. 564, *, 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e. g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.

[*573] There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

[***HR14] The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437. *Wieman v. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *United States v. Lovett*, 328 U.S. 303, 316-317; *Peters v. Hobby*, 349 U.S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. n12 In the present case, [***559] however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

-----Footnotes-----

n12 The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

-----End Footnotes-----

[***HR15] [***HR16] [***HR17] Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would [*574] be a different case. For "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury" *Joint Anti-Fascist Refugee Committee v. McGrath*, supra, at 185 (Jackson, J., concurring). See *Truax v. Raich*, 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner v. Committee on Character*, 373 U.S. 96, 103. See *Cafeteria Workers v. McElroy*, supra, at 898. In the present case, however, this principle does not come into play. n13

-----Footnotes-----

n13 The District Court made an assumption "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F.Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, arguendo, that such a "substantial adverse effect" under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232.

-----End Footnotes-----

[**2708]

[***HR18] [***HR19] [***HR20] To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that [*575]the decision not to rehire him was, in fact, based on his free speech activities. n14

-----Footnotes-----

n14 See n. 5, supra. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." Ibid.

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll v. Princess Anne*, 393 U.S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717. See *Freedman v. Maryland*, 380 U.S. 51; *Bantam Books v. Sullivan*, 372 U.S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

-----End Footnotes-----

[***HR21] Hence, [***560] on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. [HN4] It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers v. McElroy*, supra, at 895-896.

[*576] III

[***HR22] [HN5] The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254. n15 [*2709] See *Flemming v. Nestor*, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, and college professors and [*577] staff members dismissed during the terms of their contracts, *Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last [***561]year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208.

-----Footnotes-----

n15 *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.*, at 123.

-----End Footnotes-----

[**HR23] [**HR24] Certain attributes of "property" interests protected by procedural due process emerge from these decisions. [HN6] To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

[**HR25] [HN7] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

[*578] Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

[**2710]

[**HR26] Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. n16 In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

-----Footnotes-----

n16 To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a

408 U.S. 564, *, 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

"common law" of re-employment, see *Perry v. Sindermann*, post, at 602, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

-----End Footnotes-----

IV

[**562]

[**HR27] Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public [*579] colleges and universities. n17 For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

-----Footnotes-----

n17 See, e. g., Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

-----End Footnotes-----

[**HR28] We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the decision of this case.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see post, p. 603.]

[For dissenting opinion of MR. JUSTICE BRENNAN, see post, p. 604.]

DISSENTBY: DOUGLAS; MARSHALL

DISSENT: MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth, like *Sindermann* in the companion case, had no tenure under Wisconsin law and, unlike *Sindermann*, he had had only one year of teaching at Wisconsin State University-Oshkosh -- where during 1968-1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the [*580] black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in Federal District Court under 42 U. S. C. § 1983 n1 claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing [**2711] to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F.Supp. 972, 983. The Court of Appeals affirmed. 446 F.2d 806.

408 U.S. 564, *, 92 S. Ct. 2701, **,
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

-----Footnotes-----

n1 Section 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

-----End Footnotes-----

Professor Will Herberg, of Drew [***563] University, in writing of "academic freedom" recently said:

"It is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.

"But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional." Washington Sunday Star, Jan. 23, 1972, B-3, col. 1.

[*581] There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in Sindermann.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurter stated the constitutional theory in *Sweezy v. New Hampshire*, 354 U.S. 234, 261-262 (concurring in result):

"Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good -- if understanding be an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered [*582] as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

We repeated that warning in *Keyishian v. Board of Regents*, 385 U.S. 589, 603:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

408 U.S. 564, *, 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of [***564] an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U. S. C. § 151 et seq. While discharges of employees for "cause" are [**2712] permissible (*Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217), discharges because of an employee's union activities are banned by § 8 (a)(3), 29 U. S. C. § 158 (a)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 300.

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the *Sweezy* case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the *Keyishian* case, one of the petitioners (*Keyishian* himself) had only a "one-year-term contract" that was not renewed. 385 U.S., at 592. In *Shelton v. Tucker*, 364 U.S. 479, one of the petitioners was [*583] a teacher whose "contract for the ensuing school year was not renewed" (*id.*, at 483) and two others who refused to comply were advised that it made "impossible their re-employment as teachers for the following school year." *Id.*, at 484. The oath required in *Keyishian* and the affidavit listing memberships required in *Shelton* were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system, as we noted in *Pickering v. Board of Education*, 391 U.S. 563, 569. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, e. g., *Graham v. Richardson*, 403 U.S. 365, 374. See *Van Alstyne*, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). In *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in *American Communications Assn. v. Douds*, 339 U.S. 382, 402, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In *Wieman v. Updegraff*, 344 U.S. 183, we held that an applicant could not be denied the opportunity [*584] for public employment because he had exercised his First Amendment rights. And in *Speiser v. Randall*, 357 U.S. 513, we held that a denial of a tax exemption unless one [***565] gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in *Speiser v. Randall*, *supra*, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "The 'protection of the individual against arbitrary action' . . . [is] the very essence of due process," *Slochower v. Board of Education*, 350 U.S. 551, 559, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."

[**2713] Moreover, where "important interests" of the citizen are implicated (*Bell v. Burson*, 402 U.S. 535, 539) they are not to be denied or taken away without due process. *Ibid.* *Bell v. Burson* involved a driver's license. But also included are disqualification for unemployment compensation (*Sherbert v. Verner*, 374 U.S. 398), discharge from public employment (*Slochower v. Board of Education*, *supra*), denial of tax exemption (*Speiser v. Randall*, *supra*), and withdrawal of welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254). And see *Wisconsin v. Constantineau*, 400 U.S. 433. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria Workers v. McElroy, 367 U.S. 886, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior [*585] to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons -- both of which were refused by petitioners -- there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F.Supp., at 979-980:

"Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary [***566]non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed [*586] time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact."

It was that procedure that the Court of Appeals approved. 446 F.2d, at 809-810. The Court of Appeals also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures [**2714]had been completed. n2 As stated by the Court of Appeals in Sindermann v. Perry, 430 F.2d 939 (CA5):

"School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." Id., at 944-945.

-----Footnotes-----

n2 Such a procedure would not be contrary to the well-settled rule that § 1983 actions do not require exhaustion of other remedies. See, e. g., Wilwording v. Swenson, 404 U.S. 249 (1971); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). One of the allegations in the complaint was that respondent was denied any effective state remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of § 1983.

-----End Footnotes-----

That is a permissible course for district courts to take, though it does not relieve them of the final determination [*587] whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, dissenting.

408 U.S. 564, *, 92 S. Ct. 2701, **,
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968-1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year. n1 This claim was sustained by the District [***567] Court, which granted respondent summary judgment, 310 F.Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F.2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

-----Footnotes-----

n1 Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

-----End Footnotes-----

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property [*588] interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling -- i. e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory n2 or contractual n3 controls, a government employer is different. The government may only act fairly and reasonably.

-----Footnotes-----

n2 See, e. g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 42 U. S. C. § 2000e.

n3 Cf. Note, *Procedural "Due Process" in Union Disciplinary Proceedings*, 57 Yale L. J. 1302 (1948).

-----End Footnotes-----

[**2715] This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Hughes, J.). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax v. Raich*, *supra*, at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty -- [*589] liberty to work -- which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, e. g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); *United States v. Lovett*, 328 U.S. 303, 316-317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must [***568] say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

MR. JUSTICE DOUGLAS has written that:

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, supra, at 179 (concurring opinion).

And Mr. Justice Frankfurter has said that "the history of American freedom is, in no small measure, the [*590] history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that "the public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby v. Allen*, 326 F.2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, e. g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons [**2716] and a chance for a hearing on disputed issues of fact; n4 that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; n5 that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; n6 and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute. n7 I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons [***569] and given an opportunity to respond.

-----Footnotes-----

n4 *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926).

n5 *Slochower v. Board of Education*, 350 U.S. 551 (1956).

n6 *Willner v. Committee on Character*, 373 U.S. 96 (1963).

n7 *Connell v. Higginbotham*, 403 U.S. 207 (1971).

-----End Footnotes-----

[*591] It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. *Goldberg v. Kelly*, supra. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits [*592] from occurring." *Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

"In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice' -- blunders which are [**2717] likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law 70, 73 (1961).

Accordingly, I dissent.

REFERENCES:

15 Am Jur 2d, Colleges and Universities 11-15; 16 Am Jur 2d, Constitutional Law 341-352, 358-381, 542-584

5 Am Jur Pl & Pr Forms (Rev ed), Colleges and Universities, Form Nos. 1-8

22 Am Jur Proof of Facts 563, Dismissal of Teachers for Cause

US L Ed Digest, Colleges and Universities 1; Constitutional Law 103, 104, 513, 514, 525, 527, 529, 530, 538, 634, 717, 746, 786, 787, 803.5, 925, 928, 934; Property and Property Rights 1, 2

ALR Digests, Colleges and Universities 1, 1.5; Constitutional Law 441 et seq.

408 U.S. 564, *; 92 S. Ct. 2701, **;
33 L. Ed. 2d 548, ***; 1972 U.S. LEXIS 131

L Ed Index to Anno (Rev ed), Civil Rights; Colleges and Universities; Due Process of Law; Freedom of Speech, Press, Religion and Assembly; Officers; Schools

ALR Quick Index, Colleges and Universities; Constitutional Law; Due Process of Law; Freedom of Speech and Press; Public Officers and Employees; Schools

Federal Quick Index, Civil Rights; Colleges and Universities; Due Process of Law; Educational Institutions; Freedom of Speech and Press; Public Officers and Employees; Schools and School Districts

Annotation References:

Freedom of speech and press as bar to state action under due process clause. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Sufficiency of notice of intention to discharge teacher, or not to renew contract, under statutes requiring such notice. 92 ALR2d 751.

Constitutionality of regulation for dismissal or rejection of public school teacher because of disloyalty. 27 ALR2d 487.

Control by government of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties. 163 ALR 1358.

Teacher's tenure statutes. 110 ALR 791, 113 ALR 1495, 127 ALR 1298.

THOMAS J. BOWERS, Plaintiff-Appellant, v. TOWN OF SMITHSBURG, MARYLAND, Defendant-Appellee.
No. 98-1038

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 1648

October 29, 1998, Argued
February 5, 1999, Decided

NOTICE:

[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1999 U.S. App. LEXIS 12193.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge. (CA-97-3304-L).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from the decision of the United States District Court for the District of Maryland, which granted summary judgment in favor of defendant town in a case concerning reinstatement and damages.

OVERVIEW: Defendant municipality fired plaintiff as chief of police. Plaintiff sued for reinstatement and damages under 42 U.S.C.S. § 1983, claiming that defendant deprived him of a property interest in public employment in violation of the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV. He claimed that he had a valid property interest because of Md. Code art. 23A, § 2(b)(25), which granted municipal legislative bodies the power to remove appointed officials for cause after a notice and a hearing. The trial court granted summary judgment to defendant. The court held that neither Maryland employment law, defendant's charter, nor Md. Code art. 23A, § 2(b)(25) gave plaintiff a federally protected property right in continued employment. Accordingly, defendant did not violate the Due Process Clause of the Fourteenth Amendment when plaintiff was fired and the trial court's judgment was affirmed.

OUTCOME: The trial court granted summary judgment in favor of defendant. On appeal, the court affirmed the ruling because defendant did not violate the Due Process Clause of the Fourteenth Amendment when it fired plaintiff from his job as chief of police.

CORE TERMS: appointed, municipality, municipal, property interest, charter, alterius, exclusio, unius, Fourteenth Amendment, property right, expressio, public employment, expressly granted, legislative body, police officer, implied power, repealed, notice, fired, pleasure, hire, continued employment, summary judgment, power to remove, promulgated, empowered, federally, removing, manifest, caution

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Procedural Due Process: Scope of Protection

[HN1] The Fourteenth Amendment, U.S. Const. amend. XIV, does not itself create property rights but rather affords a protection to them. Property rights are determined from sources independent of the Constitution, such as state law.

Governments: Local Governments: Employees & Officials

[HN2] Under Maryland law, absent some special tenure provision, a local government employee, including a police officer, serves at will and, therefore, does not have a property right in continued public employment. Absent some special tenure provision, a police officer does not have a federally protected right to continued employment as a police officer.

Governments: Local Governments: Ordinances & Regulations

[HN3] See Md. Code art. 23A, § 2(b)(25).

Governments: Legislation: Interpretation

[HN4] Indeed, as the Court of Appeals of Maryland has recognized the maxim *expressio unius est exclusio alterius* is not a rule of law, but merely an auxiliary rule of statutory construction applied to assist in determining the intention of the legislature where such intention is not manifest from the language used. It should be used with caution, and should never be applied to override the manifest intention of the legislature.

Governments: Local Governments: Duties & Powers

[HN5] Maryland courts, however, have held consistently that municipalities have powers that are not expressly granted by the Maryland Code or Constitution. Maryland municipalities have powers that are fairly implied from the powers expressly granted, and powers that are essential to the accomplishment of the objects of the municipality. The failure of the Maryland Code or Constitution to explicitly grant a power does not require a court to conclude that the power does not exist.

Governments: Local Governments: Duties & Powers

[HN6] The express powers that the General Assembly granted municipalities necessarily implies the power to hire and fire employees. For example, municipal legislatures are granted the right to establish a merit system for nonappointed and nonelected employees, to establish a retirement system, and to fix the salaries and compensation of all municipal officers and employees. In fact, the express powers granted by Md. Code art. 23A, § 2(b) do not include the power to hire municipal employees, but it is beyond doubt that municipalities have that power.

Governments: Local Governments: Duties & Powers

[HN7] The Maryland General Assembly recognized that municipalities have an implied power to fire appointed officials without complying with Md. Code art. 23A, § 2(b)(25).

COUNSEL: ARGUED:

Paul Benedict Weiss, MARTIN & SEIBERT, L.C., Martinsburg, West Virginia, for Appellant.

Daniel Karp, ALLEN, JOHNSON, ALEXANDER & KARP, Baltimore, Maryland, for Appellee.

ON BRIEF: Lewis C. Metzner, Hagerstown, Maryland, for Appellant.

Denise Ramsburg Stanley, ALLEN, JOHNSON, ALEXANDER & KARP, Baltimore, Maryland; Edward L. Kuczynski, KUCZYNSKI & KUCZYNSKI, P. A., Hagerstown, Maryland, for Appellee.

JUDGES: Before WIDENER and MURNAGHAN, Circuit Judges, and WILSON, Chief United States District Judge for the Western District of Virginia, sitting by designation.

OPINION: OPINION

PER CURIAM:

In August of 1997, the Mayor of the Town of Smithsburg, Maryland, fired Thomas Bowers from his position as Chief of Police. Bowers sued for reinstatement and damages under 42 U.S.C. § 1983 (1994), claiming that the Town deprived him of a property[*2] interest in public employment in violation of the Due Process Clause of the Fourteenth Amendment. He claimed that he had a property interest because of article 23A, section 2(b)(25) of the Maryland Code, which grants municipal legislative bodies the power to remove appointed officials for cause after notice and a hearing. See Md. Ann. Code art. 23A, § 2(b)(25) (1996). Bowers argued that section 2(b)(25) establishes the exclusive method for removing appointed municipal officials. The District Court granted the Town's motion for summary judgment. See *Bowers v. Town of Smithsburg*, 990 F. Supp. 396 (D. Md. 1997). It found that the Town police chief is an at-will employee whom the Mayor is empowered to remove without cause and without a hearing, and that section 2(b)(25) simply details when and how a municipal legislative body is empowered to remove an appointed municipal employee. See *id.* at 401. We agree and affirm.

I.

On September 7, 1997, the Town of Smithsburg hired Bowers as a Chief of Police. The Town's charter provided that the "mayor, with the approval of the council, shall appoint the heads of all offices, departments, and agencies...." See *Smithsburg, Md.*, [*3] Charter § 31-19(b) (1957), reprinted in *Pub. Local L. Wash. County* (1970 & Supp. 1979) at 134-6. Although it limited the Mayor's ability to hire department heads, the Town's charter granted the Mayor the power to fire appointed officials without cause. See *id.* ("All office, department, and agency heads shall serve at the pleasure of the mayor."). In August of 1997, the Mayor, Mildred Myers, exercised this power and fired Bowers. n1 The Mayor did not give Bowers prior notice or a hearing. Shortly after his dismissal, Bowers filed this § 1983 action, claiming that the Town violated his due process rights.

-----Footnotes-----

n1 Bowers was notified of his dismissal by letter. He received a letter dated August 13, 1997, signed by the Mayor and all five members of the Town's council. The letter stated that the Mayor and the council met in executive session on August 5, 1997, and decided "by unanimous decision" to fire Bowers from his position. The District Court found that the Mayor had exercised her power to fire Bowers. Although the council concurred in the Mayor's judgment, it did not exercise any independent power to remove Bowers.

-----End Footnotes-----

[*4]

The District Court granted summary judgment for the Town because it concluded that article 23A, section 2(b)(25) of the Maryland Code is not the exclusive means of removing an appointed municipal official. See *Bowers*, 990 F. Supp. at 400. It found "no indication" that section 2(b)(25) "supplants the power of the mayor to remove appointed municipal officials from office." *Id.* at 400. The District Court observed that section 2(b)(25) merely "provides a city council with a check upon the administrative powers that the charter delegates to the mayor." *Id.* at 399. The Court analogized section 2(b)(25) to the power of the United States Congress to impeach and remove. See *id.* at 400 (citing U.S. Const. art. I, §§ 2 & 3). Consequently, the District Court held that Bowers did not have a property interest protected by the Due Process Clause of the Fourteenth Amendment.

II.

As the District Court recognized, Bowers does not have a claim under the Due Process Clause unless he had a property right. " [HN1] The Fourteenth Amendment does not itself create property rights but rather affords a protection to them. Property rights are determined from sources independent of the Constitution, [*5]such as ... state law." *Linton v. Frederick County Bd. of County Comm'rs*, 964 F.2d 1436, 1438 (4th Cir. 1992); see *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Thus, we first examine Maryland law.

[HN2] Under Maryland law, absent some special tenure provision, a local government employee, including a police officer, serves "at will" and, therefore, does not have a property right in continued public employment. See *Elliott v. Kupferman*, 58 Md. App. 510, 473 A.2d 960, 966 (Md. Ct. Spec. App. 1984) ("Absent some special tenure provision, a police officer does not have a federally protected right to continued employment as a police officer."). If the Town had

granted merit protection to the position of chief of police or if Bowers had an employment contract that altered his "at will" status, he would have had a protected property interest. Bowers, however, cannot claim either and concedes that under the Town's charter, which was validly adopted, appointed officials serve at the Mayor's pleasure. See Charter § 31-19(b). It would seem to follow that Bowers had no protected property interest in his job.

Bowers, nevertheless, claims that[*6] he had a protected property interest because of [HN3] article 23A, section 2(b)(25), which states:

in addition to, but not in substitution of, the powers which have been granted ... [a municipal] legislative body shall also have the following express ordinance-making powers:

... (25) To remove or temporarily suspend from office any person who has been appointed to any municipal office and who after due notice and hearing is adjudged to have been guilty of inefficiency, malfeasance, misfeasance, nonfeasance, misconduct in office, or insubordination...

Bowers argues that section 2(b)(25) provides the exclusive means by which municipalities can remove appointed officials. According to Bowers, when the Maryland General Assembly passed section 2(b)(25), it implicitly rescinded, despite the express provisions of the Town's lawfully adopted Charter, the mayor's authority to fire appointed officials. According to Bowers, only the legislative body of a municipality can fire an appointed official and then only for cause after notice and a hearing.

Bowers contends that this result is dictated by the canon of statutory construction that "[a] statute that directs a thing to be done[*7] in a particular manner ordinarily implies that it shall not be done otherwise." *Roselle Park Trust Co. v. Ward Baking Corp.*, 177 Md. 212, 9 A.2d 228, 231 (Md. 1939). n2 Bowers misapplies the rules of statutory construction.

-----Footnotes-----

n2 This canon is referred to as *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), see *Black's Law Dictionary* 581 (6th ed. 1990), or *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another), see *id.* at 763.

-----End Footnotes-----

[HN4]

Indeed, as the Court of Appeals of Maryland has recognized the maxim "*expressio unius est exclusio alterius*" ... is not a rule of law, but merely an auxiliary rule of statutory construction applied to assist in determining the intention of the Legislature where such intention is not manifest from the language used. It should be used with caution, and should never be applied to override the manifest intention of the Legislature...

Hylton v. Mayor & City Council of Baltimore, 268 Md. 266, 300 [*8] A.2d 656, 664 (Md. 1972) (quoting *Kirkwood v. Provident Sav. Bank*, 205 Md. 48, 106 A.2d 103, 107 (Md. 1954)); see *INS v. Federal Labor Relations Auth.*, 4 F.3d 268, 272 (4th Cir. 1993) (refusing to apply *expressio unius est exclusio alterius* when the statute was not an effort "at legislative micromanagement"); *Director, Office of Workers' Compensation Programs v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) ("The maxim [*expressio unius est exclusio alterius*] is to be applied with great caution and is recognized as unreliable."). Nevertheless, Bowers argues that the absence of any express reference in the Maryland Code or Constitution to a municipal executive's power to fire appointed officials requires this court to conclude that municipalities can only fire appointed officials in accordance with section 2(b)(25).

Bowers correctly notes that Maryland municipalities have limited powers. See *City of New Carrollton v. Belsinger Signs, Inc.*, 266 Md. 229, 292 A.2d 648, 652 (Md. 1972). [HN5] Maryland courts, however, have held consistently that municipalities have powers that are not expressly granted by the Maryland Code or Constitution. See *Hardy* [*9] v. *Housing Management Co.*, 293 Md. 394, 444 A.2d 457, 458 (Md. 1982); *Birge v. Town of Easton*, 274 Md. 635, 337 A.2d 435, 440 (Md. 1975); *Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230, 335 A.2d 679, 689 (Md. 1975); *Belsinger Signs*, 292 A.2d at 652; *McRobie v. Mayor & Comm'rs of Westernport*, 260 Md. 464, 272 A.2d 655, 656 (Md. 1971);

Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. 293, 96 A.2d 353, 358 (Md. 1953). Maryland municipalities have powers that are fairly implied from the powers expressly granted, and powers that are essential to the accomplishment of the objects of the municipality. See *Hardy v. Housing Management Co.*, 293 Md. 394, 444 A.2d 457 at 458; *Birge*, 337 A.2d at 440; *Bowie Inn*, 335 A.2d at 689; *Belsinger Signs*, 292 A.2d at 652; *McRobie*, 272 A.2d at 656; *Montgomery County*, 96 A.2d at 358. The failure of the Maryland Code or Constitution to explicitly grant a power does not require a court to conclude that the power does not exist. See, e.g., *Birge*, 337 A.2d at 440 (finding that the General Assembly's grant of the power to operate an electric utility fairly implied the power to acquire property lying in another state).

[HN6] The express powers that[*10] the General Assembly granted municipalities necessarily implies the power to hire and fire employees. For example, municipal legislatures are granted the right to establish a merit system for nonappointed and nonelected employees, see art. 23A, § 2(b)(19), to establish a retirement system, see id. § 2(b)(21), and to fix the salaries and compensation of all municipal officers and employees, see id. § 2(b)(26). In fact, the express powers granted by section 2(b) do not include the power to hire municipal employees, but it is beyond doubt that municipalities have that power.

[HN7] Additionally, the Maryland General Assembly recognized that municipalities have an implied power to fire appointed officials without complying with section 2(b)(25). In 1955, the General Assembly passed a "Model Town Charter," upon which Smithsburg's Charter is based. See Md. Ann. Code art. 23B (Supp. 1955) (repealed 1994). This Model Town Charter gave the mayor the power to fire appointed officials. See id. § 21(b) ("All office, department, and agency heads shall serve at the pleasure of the mayor."). The Model Town Charter, being a mere example and lacking the force of law, did not independently[*11] create this power. See *Inlet Assoc. v. Assateague House Condominium Assoc.*, 313 Md. 413, 545 A.2d 1296, 1305 n.4 (Md. 1988). Indeed, the General Assembly recently repealed the Model Town Charter. See Md. Ann. Code art. 23B, ed.'s note (1996). Yet, the General Assembly adopted the Model Town Charter shortly after passing the language in section 2(b)(25), n3 and it was presumably aware of section 2(b)(25)'s supposed impact on a municipal executive's ability to fire appointed officials. See *State v. Bricker*, 321 Md. 86, 581 A.2d 9, 12 (Md. 1990) ("It is presumed that the General Assembly acted with full knowledge of prior legislation and intended statutes that affect the same subject matter to blend into a consistent and harmonious body of law."). The General Assembly would not have promulgated a Model Town Charter that allowed a mayor to fire appointed officials if municipalities did not have the implied power to fire employees outside the confines of section 2(b)(25). This stark evidence of an implied power, combined with well-settled Maryland law recognizing that municipalities have powers not expressly granted, further exposes the weakness of Bowers's argument. The Model[*12] Town Charter and the express powers granted municipalities by article 23A, section 2 provide ample proof that the General Assembly did not intend for section 2(b)(25) to be the exclusive means by which a municipality can fire an appointed official.

-----Footnotes-----

n3 The language in article 23A, section 2(b)(25) was originally enacted in 1947. See Md. Ann. Code art. 23A, § 2(26) (Flack 1951). The Model Town Charter was promulgated in 1955. See Md. Ann. Code art. 23B, § 21(b) (Supp. 1955) (repealed 1994).

-----End Footnotes-----

III.

Neither Maryland employment law, the Town's charter, nor article 23A, section 2(b)(25) of the Maryland Code gave Bowers a federally protected property right in continued employment. n4 Accordingly, the Mayor did not violate the Due Process Clause of the Fourteenth Amendment when she fired Bowers.

-----Footnotes-----

n4 Bowers did not request that this court certify a question to the Court of Appeals of Maryland. We believe that certification is not necessary in this case because Bowers clearly does not have a property right in continued public employment under Maryland law.

-----End Footnotes-----

[*13]

The decision of the District Court is AFFIRMED.

ELEANOR CARTER, APPELLANT, v. JOHN S. HAHN, APPELLEE.
No. 02-CV-226

DISTRICT OF COLUMBIA COURT OF APPEALS

2003 D.C. App. LEXIS 219

March 20, 2003, Submitted
April 17, 2003, Decided

NOTICE:

[*1] THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE ATLANTIC AND MARYLAND REPORTERS. USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

PRIOR HISTORY: Appeal from the Superior Court of the District of Columbia. (CA-4615-00). (Hon. Zoe Bush, Trial Judge).

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sued appellees, a store owner and others, for intentional infliction of emotional distress and defamation related to her arrest on theft charges. The employee appealed the judgment of the Superior Court of the District of Columbia, which granted the store owner's motion for directed verdict and dismissed the employee's claims.

OVERVIEW: The employee relocated, but her employer sent her paycheck to her old address and she never received it. The employer issued a replacement check and placed a stop payment order on the original check. Someone obtained the original check and cashed it at the store owner's store. The store owner claimed that he knew the employee and that she was the person who cashed the check at his store. The employee was arrested and charged with theft. When the store owner could not identify the employee in a lineup, the charges against her were dropped. On appeal, the employee argued that in directing a verdict against her the trial court completely ignored the store owner's statement. The appellate court concluded that the trial court's directed verdict judgment was improper. Reasonable jurors could find that the store owner intentionally or recklessly lied about knowing the employee "very well" because she regularly cashed her checks at his store, and further reasonably could conclude that the store owner's lies resulted in the accusation that the employee stole government funds, thus injuring the employee in her trade, profession or community standing.

OUTCOME: The judgment of the trial court was reversed and the case was remanded for a new trial.

CORE TERMS: intentional infliction of emotional distress, defamation, quotations, directed verdict, intentionally, malice, qualified privilege, jurors, recklessly, outrageous, cashed, theft, investigator, signature, overnight, paycheck, lied, law enforcement authorities, outrageous conduct, prima facie case, wrongdoing, suspected, favorable, complete defense, arrest warrant, criminal trial, new trial, apprehended, interviewed, mistakenly

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN1] A qualified privilege is a complete defense to defamation, except where malice is shown.

Civil Procedure: Trials: Judgment as Matter of Law

Civil Procedure: Appeals: Standards of Review: Standards Generally

[HN2] A directed verdict is proper if during a trial by jury the plaintiff has been fully heard with respect to her claim, and there is no legally sufficient evidentiary basis for a reasonable jury to have found for her. Accordingly, a verdict may be directed only if it is clear that the plaintiff has not established a prima facie case. Furthermore, since the trial court is not the trier of fact it must take care to avoid weighing the evidence, passing on the credibility of witnesses, or substituting its judgment for that of the jury. And in reviewing a directed verdict, an appellate court views the facts, as the trial court was required to, in the light most favorable to the plaintiff.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN3] To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) caused the plaintiff severe emotional distress. Liability will not be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. But it is properly imposed where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN4] To prove defamation, a plaintiff bringing a defamation action must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN5] A qualified privilege exists when a statement about suspected wrongdoing is made in good faith to law enforcement authorities. Whether a statement is protected by a privilege is a question of law for the trial court. Furthermore, the qualified privilege is a complete defense to defamation unless there is a showing of malice. That term has been defined as the commission of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will. Moreover, all definitions of malice in substance come down to the equivalent of bad faith.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN6] While mistakenly calling the police and informing them that someone is committing a criminal act may not be sufficiently outrageous conduct to warrant the recovery of damages for intentional infliction of emotional distress even if those statements are false, intentionally or recklessly doing so may rise to that level, particularly since laws prohibit making false representations to public authorities.

COUNSEL: Robert W. Rifkin for appellant.

Nathaniel Sims for appellee.

JUDGES: Before SCHWELB, RUIZ, and REID, Associate Judges.

OPINIONBY: REID

OPINION:

REID, Associate Judge: Appellant, Ms. Eleanor Carter, sued Mr. John S. Hahn and others for intentional infliction of emotional distress and defamation related to her arrest on theft charges. n1 On appeal she challenges the trial court's decision to grant his motion for directed verdict and to dismiss her claims. We reverse and remand for a new trial.

-----Footnotes-----

n1 Her complaint also named as defendants the District of Columbia, the District of Columbia Housing Authority ("DCHA") and Investigator Paul Sinclair, an employee in the DCHA's Office of Public Safety. However, her claims against them were dismissed.

-----End Footnotes-----

[*2]

FACTUAL SUMMARY

In late May 1999, Ms. Carter relocated and completed the necessary forms with her employer (DCHA) to have her paycheck mailed to her new home address. But the check was mistakenly sent to her old address and she never received it. So the DCHA issued her a replacement check. It also placed a stop payment order on her original check. In the meantime, someone retrieved the original check and endorsed it in Ms. Carter's name. That person presented the check for payment to the Market Liquor Store at 1400 7th Street, Northwest, which offers a check-cashing service. n2 Mr. Hahn, the store's operator, paid the check but was not reimbursed by the DCHA. He then met with Investigator Paul Sinclair twice regarding the matter. At their first meeting Investigator Sinclair explained that the agency would not pay him for the check. And at their second meeting Mr. Hahn claimed that he knew Ms. Carter and that she was the person who cashed the check at his store. Investigator Sinclair verified as much in a sworn affidavit and obtained a warrant for Ms. Carter's arrest. Officers with the Metropolitan Police Department then apprehended her on June 23, 1999, at the[*3] DCHA's offices, charged her with theft and held her overnight. Unbeknownst to Investigator Sinclair or any of the officers, this information was false.

-----Footnotes-----

n2 The check was in the amount of \$801.46.

-----End Footnotes-----

Shortly before trial on August 25, 1999, authorities held a line-up and learned that Mr. Hahn could not identify Ms. Carter. So they dropped the charges against her. n3 She then filed a civil complaint; and Mr. Hahn subsequently recanted his claims.

-----Footnotes-----

n3 In response to the charges, the DCHA initially suspended, then terminated, Ms. Carter's employment. But the agency reinstated her and awarded her back pay once the charges were dismissed.

-----End Footnotes-----

The case was tried before a jury as one for defamation and intentional infliction of emotional distress. After the completion of Ms. Carter's case-in-chief, the trial court granted a directed verdict on behalf of[*4] Mr. Hahn because [HN1] a "qualified privilege is a complete defense . . . to defamation. . . ." except where malice is shown; and Ms. Carter failed to establish malice. The trial court also granted a directed verdict on Ms. Carter's intentional infliction of emotional distress claim because of her alleged failure to prove that Mr. Hahn's conduct "was extreme or outrageous or . . . intentionally reckless."

ANALYSIS

Ms. Carter contends that in directing a verdict against her on her intentional infliction of emotional distress and defamation claims the trial court "completely ignored" the statement Mr. Hahn made to Investigator Sinclair. She claims that jurors could have reasonably inferred from this evidence, and Mr. Hahn's subsequent actions, that he "lied" in an effort to gain "the assistance of the criminal justice system to recover his money" regardless of the consequences to her.

[HN2] A directed verdict is proper "if during a trial by jury [Ms. Carter] has been fully heard with respect to [her claim], and there is no legally sufficient evidentiary basis for a reasonable jury to have found for [her]."⁵ *Abebe v. Benitez*, 667 A.2d 834, 835-36 (D.C. 1995) (quoting Super. Ct. Civ. R. 50 (a)(1)). Accordingly, "[a] verdict may be directed only if it is clear that [she] has not established a prima facie case." *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1097 (D.C. 1994) (internal quotations and citations omitted). Furthermore, since the trial court is not the trier of fact it "must take care to avoid weighing the evidence, passing on the credibility of witnesses, or substituting its judgment for that of the jury." *Abebe*, supra, 667 A.2d at 836 (internal quotations and citations omitted). And "in reviewing a directed verdict, we view the facts, as the trial court was required to, in the light most favorable to [Ms. Carter]." *Haynesworth*, supra, 645 A.2d at 1097 (internal quotations and citations omitted).

Moreover, [HN3] "to establish a prima facie case of intentional infliction of emotional distress, [Ms. Carter] must show (1) extreme and outrageous conduct on the part of [Mr. Hahn] which (2) either intentionally or recklessly (3) caused [her] severe emotional distress." *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002) (citations omitted). "Liability⁶ will not be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (internal quotations and citations omitted) (amended by, 720 A.2d 1152 (D.C. 1998)). But it is properly imposed where the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Larijani*, supra, 791 A.2d at 44 (internal quotations and citations omitted).

[HN4] To prove defamation, "[a] plaintiff bringing a defamation action . . . must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (quoting⁷ *Crowley v. North American Telecomms. Ass'n*, 691 A.2d 1169, 1173 n.2 (D.C. 1997) (other citation omitted)).

Here, the evidence, as viewed in the light most favorable to Ms. Carter, indicates that reasonable jurors could find Mr. Hahn intentionally and recklessly lied about Ms. Carter's theft of government funds. According to Investigator Sinclair Mr. Hahn initially came to his office in early June 1999 claiming that "he didn't understand why" the agency stopped payment on the check. He interviewed Mr. Hahn briefly, then investigated the matter further. Subsequently, he went to Mr. Hahn's store at a later date and interviewed him again. At that point, for the first time, Mr. Hahn claimed that he knew Ms. Carter. He indicated that his surveillance equipment had malfunctioned so he was unable to record the transaction. But he maintained that "he knew[] [her] very well . . . because [she] . . . came[] in his . . . business regularly to cash checks." Based on this information, Investigator Sinclair completed a sworn affidavit and obtained an arrest warrant for her. Authorities then apprehended Ms. Carter and charged her with theft.

For the next month and a half, ⁸ according to the record, Mr. Hahn's claims remained unchanged. However, on the eve of the criminal trial a line-up was held and Mr. Hahn was "unable to identify [Ms. Carter]." And soon after she filed her civil complaint, Mr. Hahn recanted his story completely-claiming that he never told Investigator Sinclair any of the above. ⁴ However, when he learned of this retraction, Investigator Sinclair was surprised and testified that "[he] wouldn't have obtained an affidavit" for an arrest warrant had Mr. Hahn admitted earlier that he did not know Ms. Carter. ⁵ Furthermore, according to Ms. Carter, she did not endorse the check, had never cashed her paycheck at Mr. Hahn's store ⁶ and "had never seen Mr. Hahn before" the criminal trial. Nonetheless, as a result of the charges filed against her, she was jailed overnight.

-----Footnotes-----

ⁿ⁴ Mr. Hahn did not testify, but in his pleadings he "categorically denied" making the statement and his counsel argued accordingly at trial.

n5 He also said that Mr. Hahn claimed that she showed him her DCHA identification badge during the transaction. However, Ms. Carter testified that she was always in possession of her badge and had never lent it to anyone. [*9]

n6 The record indicates that her prior paychecks were deposited directly into her bank account.

-----End Footnotes-----

She testified that authorities "handcuffed [her in her office] and . . . carried [her] to the front of [the DCHA] building" where they held her for about fifteen minutes as several of her co-workers observed. After another police officer arrived they "frisked [her] down and . . . put [her] in [a squad] car" and took her to a nearby police station. Despite her denials, officers took her fingerprints and mug shots and placed her in a cell with up to "seven" other prisoners and held her overnight. The next morning she was handcuffed and transported to the courthouse "in a paddy wagon."

She had never been arrested before and the experience "horrified" her. She was "mad, scared, hurt . . . [and] devastated [at the time and] couldn't eat . . . [or] sleep." And she still "has nightmares sometimes" and "crying spells" related to her experience. n7

-----Footnotes-----

n7 She also testified that she continues to "have problems with [her] right hand from the handcuffs" that were placed on her.

-----End Footnotes-----

[*10]

In rendering its ruling, the trial court acknowledged the testimony of Ms. Carter and Investigator Sinclair, as well as the statement given by Mr. Hahn to the investigator. Nevertheless, the trial court concluded that Mr. Hahn was entitled to a qualified privilege as to the defamation claim because he had been reporting to the police and "there [was] no showing of malice." And, with respect to Ms. Carter's intentional infliction of emotional distress claim, there was "absolutely no evidence whatsoever of any conduct on the part of Mr. Hahn that was extreme or outrageous or that was intentionally reckless."

We turn first to the trial court's conclusion regarding defamation and qualified privilege. [HN5] "[A] qualified privilege exists when a statement about suspected wrongdoing is made in good faith to law enforcement authorities." *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995) (citations omitted). "Whether a statement is protected by a privilege is a question of law for the [trial] court." *Id.* (citation omitted). Furthermore, "the qualified privilege is a complete defense to [defamation]" unless there is a showing of malice. *Id.* at 656[*11] (internal quotations and citation omitted). That term has been defined as the commission "of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Id.* (citation omitted). Moreover, "all definitions [of malice] in substance come down to the equivalent of bad faith" which jurors could reasonably find existed on the part of Mr. Hahn as explained above. *Id.* at 656 n.8 (internal quotations and citations omitted).

In concluding that there was "no showing of malice" based on the record, the trial court stated that: "in reporting the suspected . . . wrongdoing to law enforcement authorities Mr. Hahn relied on a comparison of the person's ID and that person[s] appearance with a signature on the ID and the signature on the check as well as the fact that he observed the person." It further pointed out that Investigator Sinclair testified that the signatures on the check and in Ms. Carter's personnel file "are the same"; and it found them to be "substantially similar" as well. However, these observations only

verify that Mr. Hahn cashed [*12]the check in good faith. They have no bearing on whether his subsequent statement to Investigator Sinclair (regarding his familiarity with Ms. Carter) was made in the same manner or in bad faith.

Based on the testimony of Ms. Carter and Investigator Sinclair, reasonable jurors could find that Mr. Hahn intentionally or recklessly lied about knowing Ms. Carter "very well" because she regularly cashed her checks at his store; and further reasonably could conclude that Mr. Hahn's lies resulted in the accusation that Ms. Carter stole government funds, thus "injur[ing Ms. Carter] in [her] trade, profession or community standing or lower[ing [her] in the estimation of the community." Beeton, supra, 779 A.2d at 923 (quoting Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 594 (D.C. 2000) (other citation omitted)).

[HN6] While mistakenly "calling the police and informing them that someone is [committing a criminal act] [may not be] sufficiently outrageous conduct to warrant the recovery of damages for intentional infliction of emotional distress even if those statements are false," see Halbert v. City of Sherman, 33 F.3d 526, 529 (5th Cir. 1994),[*13] intentionally or recklessly doing so may rise to that level in this case, particularly since laws prohibit making false representations to public authorities. See e.g., United States v. Crop Growers Corp., 954 F. Supp. 335, 349 (D.D.C. 1997). Given the testimony of Ms. Carter and Mr. Sinclair, reasonable jurors could have concluded that Mr. Hahn's conduct in making false statements about his knowledge of and contact with Ms. Carter were extreme and outrageous, and designed only to get his money back for cashing a check made out to Ms. Carter.

Under the circumstances, the trial court's directed verdict judgment was improper, both with respect to the defamation and intentional infliction of emotional distress claims.

Accordingly, for the foregoing reasons, we reverse the judgment of the trial court and remand this case for a new trial.

Rose CASTIGLIONE v. The JOHNS HOPKINS HOSPITAL
No. 123, September Term, 1986

Court of Special Appeals of Maryland

69 Md. App. 325; 517 A.2d 786; 1986 Md. App. LEXIS 423; 1BNA IER CAS 1374; 105 Lab. Cas. (CCH) P55,629

December 3, 1986

PRIOR HISTORY: [***1]

Appeal from Circuit Court for Baltimore City, Joseph I. Pines, Judge.

DISPOSITION: JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sought review of the order of the Circuit Court for Baltimore City (Maryland), which granted appellee employer's motion to dismiss and motion for summary judgment in the employee's action against the employer for breach of an employment contract.

OVERVIEW: Employee was a respiratory therapist at a hospital and was discharged by her employer. The employee filed an action against the employer for breach of an employment contract and claimed that the employer's failure to review a performance evaluation constituted a violation of the employee handbook. The employer claimed that the employee handbook contained an express disclaimer of a legally binding contract of employment. The court held: 1) that the employee did not contest the existence of the employer's disclaimer of any express or implied employment contract; 2) that the existence of a contractual disclaimer was the only material fact which could have been disputed by the employee; 3) that the trial court properly considered the issue of the disclaimer and the employee was precluded from disputing its existence on appeal; and 4) that the employer was entitled to summary judgment because the employee was an at will employee, the disclaimer language did not constitute an express or implied contract of employment, and the performance review provisions were general policy statements which did not amount to employment for a definite term or require cause for dismissal.

OUTCOME: The court affirmed the judgment of the trial court, which granted the employer's motion to dismiss and motion for summary judgment.

CORE TERMS: summary judgment, manual, memorandum, disclaimer, handbook, matter of law, contractual, unverified, deposition, employment contract, implied contract, authenticity, discrepancies, discharged, personnel, termination, indefinite, duration, granting summary judgment, sub judice, supervisor, appraisal, facts necessary, terminated, admissibility, materiality, discipline, exhibited, workforce, hired

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Motions to Dismiss

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN1] Md. R. Civ. P., Cir. Ct. 2-322(b) provides that where, on a motion to dismiss, the court considers matters outside the pleadings, the motion shall be treated as one for summary judgment.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN2] A grant of summary judgment is appropriate only where a two-fold test is met. The movant for summary judgment must clearly demonstrate the absence of any genuine issue of material fact and must also demonstrate that he is entitled to judgment as a matter of law. Md. R. Civ. P., Cir. Ct. 2-501(d).

69 Md. App. 325, *, 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

[HN3] The court, in ruling on a motion for summary judgment, must consider the pleadings, depositions, answers to interrogatories, admissions and affidavits submitted by the parties. Md. R. Civ. P., Cir. Ct. 2-501(e).

Civil Procedure: Summary Judgment: Burdens of Production & Proof

[HN4] At a hearing on a motion for summary judgment, the function of the judge is much the same as that he performs at the close of all the evidence in a jury trial when motions for directed verdict require him to determine whether an issue requires resolution by a jury, or is to be decided by the court as a matter of law. In determining whether a factual dispute exists, all inferences are to be drawn in the light most favorable to the nonmoving party.

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

[HN5] The party moving for summary judgment may place before the trial court the facts necessary to a determination for summary judgment (1) by affidavit, (2) by deposition, (3) by answers to interrogatories, (4) by admissions of facts, (5) by stipulation or concession, or (6) by pleadings. Pleadings alone may serve as the basis for providing the necessary factual prerequisites only where the allegations and the response, or lack of response establish facts as admitted or deemed to be admitted, for the purpose of the case.

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN6] The facts alleged in pleadings are not, by that means alone, before the court as facts for the purposes of summary judgment disposition. But, where one party in its pleadings concedes the existence of the only facts material to a resolution of the summary judgment motion, the concessions in these pleadings may serve as the basis for a finding of a lack of a genuine dispute as to the facts.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN7] Only a genuine dispute as to a material fact will preclude a grant of summary judgment. Md. R. Civ. P., Cir. Ct. 2-501(a). A "material" fact is one which somehow affects the resolution of the case.

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

[HN8] Concessions in pleadings may serve as a basis for summary judgment even in the absence of affidavits, depositions, or other sworn testimony.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Appeals: Standards of Review: Standards Generally

[HN9] Even where a trial judge has based an entry of summary judgment on an erroneous ground, an appellate court may affirm the judgment on any ground supported by the record.

Evidence: Hearsay Rule & Exceptions: Admissions by Party Opponent

[HN10] Party admissions in pleadings, admissible under an exception to the rule against hearsay, are considered to be substantive evidence of the facts admitted.

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

Civil Procedure: Appeals: Reviewability: Preservation for Review

[HN11] Objections to the form or admissibility of evidence submitted in support of a motion for summary judgment cannot be raised for the first time on appeal. Only objections relating to the substantive deficiency of the affidavit in setting forth the facts necessary for a prima facie case or defense may be initially raised on appeal.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN12] An employment contract of indefinite duration is considered employment "at will" which, with few exceptions, may be terminated without cause by either party at any time. The rule that employment contracts of indefinite duration can be legally terminated at any time is inapplicable where the employee is discharged for exercising constitutionally protected rights.

Labor & Employment Law: Employment Relationships: At-Will Employment

69 Md. App. 325, *, 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

[HN13] Provisions in personnel policy statements that limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee. Not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant. General statements of policy are no more than that and do not meet the contractual requirements for an offer.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN14] An employer may avoid contractual liability by any terms which clearly and conspicuously disclaim contractual intent.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN15] The purpose of the exception to the at will doctrine is to protect the legitimate expectations of employees who have justifiably relied on manual provisions precluding job termination except for cause. Justifiable reliance is precluded where contractual intent has been expressly disclaimed.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN16] Courts are reluctant to strike provisions within employment agreements voluntarily entered into between the parties in the absence of fraud, mistake or oppression.

COUNSEL: Carmen D. Hernandez (C. Christopher Brown and Brown & Goldstein, on the brief), Baltimore, for appellant.

Ronald W. Taylor (George W. Johnston and Venable, Baetjer & Howard, on the brief), Baltimore, for appellee.

JUDGES: Bloom, Rosalyn B. Bell and Karwacki, JJ., Concur.

OPINIONBY: BLOOM

OPINION: [*328] [**787] In this action for breach of an alleged employment contract, appellant, Rose Castiglione, seeks reversal of a decision of the Circuit Court for Baltimore City granting the motion of her employer, The Johns Hopkins Hospital, appellee, to dismiss the action or, in the alternative, to grant summary judgment. We will affirm the decision of the court below, treated here as a summary judgment in light of the trial court's consideration of matters outside the pleadings.

Facts

Appellant, who had been employed by The Johns Hopkins Hospital as a respiratory therapist, was discharged on September 20, 1984. Prior to her discharge, appellant attended an evaluation hearing conducted by her employer, but the Hospital did not discuss or review that evaluation[***2] with appellant before discharging her. In November, 1984, appellant filed a "non-bargaining unit appeal" form with appellee pursuant to hospital grievance procedure policies, requesting reinstatement and back pay. Several months later, appellee offered to reinstate appellant to her position but rejected any back pay award. Additionally, the proposed settlement would have reinstated appellant on a "probationary basis." Appellant rejected the proposed settlement.

Proceedings

On June 19, 1985, appellant instituted this action for breach of an alleged employment contract. In her unverified complaint appellant claimed that the failure of her employer to review with her the findings of the last evaluation [*329] constituted a violation of procedures set forth for performance appraisals in "The Johns Hopkins Hospital Employee Handbook." The provisions of the Handbook quoted in appellant's complaint were as follows:

IV -- Performance Appraisals

Your . . . supervisor will review your job performance with you at least once every (12) months.

69 Md. App. 325, *, 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***, 1 BNA IER CAS 1374

The purpose of employee performance appraisals are to: (1) inform you of your job progress and areas needing improvement, [***3] if any (2) determine and record special talents, skills and capabilities that might otherwise go unnoticed or unrecognized (3) provide an opportunity for each employee to discuss problems and interests with his/her supervisor and (4) use as a guide for wage adjustments, promotions, disciplinary actions, reassignments, etc. (Emphasis in complaint.)

Appellant alleged that the failure to provide such a review prior to her discharge constituted a violation on the part of appellee of its "unilateral contract and promises made with its employees as set forth in the expressed provisions of its written personnel policy and communicated to its employees," referring to the above-quoted material. No materials were submitted with appellant's complaint other than the proposed reinstatement agreement.

Instead of answering the complaint, appellee filed a motion to dismiss, or in the alternative, for summary judgment, contending, inter alia, that the performance appraisal policy as quoted in appellant's complaint did not constitute a binding employment contract with appellee. In a memorandum in support of the motion, it asserted that "The Johns Hopkins Hospital Employee Handbook" contained[***4] an express [**788] disclaimer that any provisions of the policy manual constituted a contract. The memorandum quoted the disclaimer in the manual as follows:

"Finally, this handbook does not constitute an express or implied contract. The employee may separate from his/her employment at any time; the Hospital reserves the right to do the same."

[*330] Another relevant portion of the manual quoted in appellee's memorandum follows:

"All managerial and administrative functions, responsibilities, and prerogatives entrusted to and conferred upon employers inherently and by law are retained and vested exclusively with [the Defendant Hospital], including but not limited to the right to exercise our judgment to establish and administer policies, practices, and procedures and change them, to direct and discipline our workforce and increase its efficiency, and to take whatever action is necessary in our judgement to operate [the Defendant Hospital]."

A copy of appellee's then current Employee's Handbook, from which the above quotations were taken, was filed as Exhibit No. 1 with the memorandum in support of appellee's motion.

In light of the quoted[***5] passages from the Handbook, appellee argued that there was no legally binding contract of employment under Maryland law. n1

-----Footnotes-----

n1. Appellee's memorandum in support of its motion referred to, but did not quote in its entirety, the evaluation and review provisions cited by appellant in her complaint, supra. Appellee's Exhibit No. 1, "The Johns Hopkins Hospital Employee Handbook" did, however, contain language virtually identical to that quoted in appellant's complaint. The relevant provisions in Exhibit No. 1 were as follows:

IV. PERFORMANCE APPRAISALS

Your supervisor will review your job performance with you at least once every twelve (12) months. The purposes of employee performance appraisals are to: (1) inform you of your job progress and areas needing improvement, if any (2) determine and record special talents, skills and capabilities that might otherwise go unnoticed or unrecognized (3) provide an opportunity for each employee to discuss problems and interests with his/her supervisor and (4) use as a guide for wage adjustments, promotions, disciplinary actions, reassignments, etc.

The nature and effect of the minor discrepancies between the evaluation and review provisions cited by appellant and those contained in appellee's Exhibit No. 1 are discussed, infra, at note 4.

-----End Footnotes-----

[***6]

69 Md. App. 325, *; 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

At no time after submission by the appellee of its motion and supporting memorandum did appellant contest the authenticity, materiality, or admissibility of the exhibit filed [*331] with the memorandum. In her response to appellee's motion, appellant did not question the exhibited document or the existence of the disclaimer language therein, but rather denied that it had legal effectiveness because of the disparity in the bargaining power of the parties. n2 In a reply to appellant's response, appellee urged that appellant had conceded the existence of the disclaimer and disagreed with appellant's arguments respecting the legal effect of such a disclaimer. Appellant filed a rebuttal to that reply, without challenging the authenticity of Exhibit No. 1 or the language quoted therefrom. At the hearing on appellee's motion there was no discussion regarding the existence or non-existence of a disclaimer, nor was there any objection to the authenticity or lack of verification of the exhibited handbook.

-----Footnotes-----

n2. In the response, appellant questions whether the hospital could "blithely disavow these legal obligations by the cloaking device of a prestated comment that this handbook does not constitute an express or implied contract."

-----End Footnotes-----

***7]

On November 6, 1985, the trial court granted appellee's motion, ruling that because of the disclaimer language therein "The Johns Hopkins Hospital Employee Handbook" did not constitute an employment contract.

Issues

The issues raised on appeal are as follows:

1. Did the lower court err in granting summary judgment on the basis of an unverified exhibit without accompanying [**789] affidavit? Alternatively, whether there was any other suitable basis for entry of summary judgment?

2. Whether an appellant for the first time on appeal may raise questions as to the competence, materiality, or admissibility of an unverified exhibit in contesting a grant of summary judgment?

[*332] 3. Whether appellee was entitled to a summary judgment as a matter of law under Staggs v. Blue Cross of Maryland?

I

[HN1] Rule 2-322(b) provides that where, on a motion to dismiss, the court considers matters outside the pleadings, the motion shall be treated as one for summary judgment. Rule 2-322(b), Md.Code Ann., Maryland Rules (1986). Since the court below based its decision on the unverified exhibit attached to the memorandum supporting appellee's motion, we shall[***8] treat the decision as a grant of summary judgment.

[HN2] A grant of summary judgment is appropriate only where a two-fold test is met. The movant for summary judgment must clearly demonstrate the absence of any genuine issue of material fact and must also demonstrate that he is entitled to judgment as a matter of law. Rule 2-501(d), Md.Code Ann., Maryland Rules (1986). See also Metropolitan Mortgage Fund, Inc. v. Basiliko, 44 Md. App. 158, 162, 407 A.2d 773 (1979); Dietz v. Moore, 277 Md. 1, 4, 351 A.2d 428 (1976); Vanhook v. Merchants Mutual Insurance Co., 22 Md. App. 22, 26, 321 A.2d 540 (1974). [HN3] The court, in ruling on a motion for summary judgment, must consider "the pleadings, depositions, answers to interrogatories, admissions and affidavits" submitted by the parties. Rule 2-501(e), Md.Code Ann., Md. Rules (1986).

[HN4] At a hearing on a motion for summary judgment, the function of the judge is "much the same as that he performs at the close of all the evidence in a jury trial when motions for directed verdict . . . require him to determine whether an issue requires resolution by a jury, or is to be decided by the court as a matter of law." 22 Md. App. at 25-26, 321 A.2d[***9] 540 (quoting Knisley v. Keller, 11 Md. App. 269, 272-73, 273 A.2d 624 (1971)). In determining

69 Md. App. 325, *, 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

whether a factual dispute exists, all inferences are to be drawn in the light most favorable to the nonmoving party. DiGrazia [*333] v. County Executive for Montgomery, 288 Md. 437, 445, 418 A.2d 1191 (1980); Berkey v. Delia, 287 Md. 302, 306, 413 A.2d 170 (1980).

Appellant's complaint is that the document on which the trial court relied in granting summary judgment, appellee's Exhibit No. 1, was not authenticated. Appellant urges there was nothing under oath by way of affidavit, deposition, interrogatory answer, or otherwise to verify that the exhibited manual was a true and accurate copy of the actual document applicable to appellant.

In Vanhook v. Merchants Mutual Insurance Co., supra, this Court specified several bases for granting summary judgment. [HN5] The party moving for summary judgment may place before the trial court the facts necessary to a determination for summary judgment (1) by affidavit, (2) by deposition, (3) by answers to interrogatories, (4) by admissions of facts, (5) by stipulation or concession, or (6) by pleadings. Vanhook, 22 Md. App. at 26-27, [***10] 321 A.2d 540; Washington Homes v. Interstate Land Development Co., Inc., 281 Md. 712, 717, 382 A.2d 555 (1978); Digrazia, supra, 288 Md. at 455, 418 A.2d 1191 (1977). Pleadings alone may serve as the basis for providing the necessary factual prerequisites only where the "[a]llegations and the response, or lack of response . . . establish facts as admitted or deemed to be admitted, for the purpose of the case." n3 22 Md. App. at 26-27, 321 A.2d 540.

-----Footnotes-----

n3. While this Court in Vanhook, supra, in reference to admissions contained in pleadings, cited certain rules related to pleading admissions that are not specifically applicable here, we are convinced that there is an analog with respect to the type of pleading concessions herein involved. Vanhook cited former Rules 311, 326 and 342 as "examples" of pleading admissions containing facts sufficient to form the basis for summary judgment disposition. Rule 311 dealt with admissions related to the existence of a partnership; Rule 326, the production of written instruments; Rule 342, pleas in bar; Rule 372, the treatment as admissions of failures to deny in an answer. This list of rules was not intended to be exhaustive. These rules were superseded by Rules 2-303, 2-322 and 2-346. Md. Ann. Code, Md. Rules of Procedure (1986).

-----End Footnotes-----

[***11]

[*334] [**790] It is clear that there were no affidavits in the matter at hand, no depositions or interrogatories, and no admissions of fact as contemplated in Vanhook. The "admissions" of fact referred to in that case related to written requests for admissions of facts and the genuineness of documents served upon a party. Id. (referencing former Rule 421, now Rule 2-424, Md. Code Ann., Md. Rules (1986)). Nevertheless, the pleadings in the case sub judice do provide the factual prerequisites for a summary judgment.

Ordinarily, [HN6] the facts alleged in pleadings are not, by that means alone, before the court as facts for the purposes of summary judgment disposition. Vanhook, supra, 22 Md. App. at 27, 321 A.2d 540. But, where, as in the instant case, one party in its pleadings concedes the existence of the only facts material n4 to a resolution of the summary [*335] judgment motion, the concessions in these pleadings may serve as the basis for a finding of a lack of a genuine dispute as to the facts. See P. Niemeyer & L. Richards, Maryland Rules Commentary Rule 2-501, at p. 252 (1984). Despite the repeated reference by appellee, in its memorandum[***12] in support of summary judgment, to the existence and language of the disclaimer contained in "The Johns Hopkins Hospital Employee Handbook," appellant, in her response and rebuttal to the motion, did not contest the existence of appellee's disclaimer of any express or implied contract.

-----Footnotes-----

n4. Appellant argues that other discrepancies of record exist which demonstrate that a genuine issue of fact remains as to the contents and applicability to appellant of appellee's Exhibit No. 1. At oral argument, appellant urged that there were several differences between the employee review and evaluation provisions quoted in appellant's complaint and those contained in appellee's Exhibit No. 1. The discrepancies are as follows: (1) While an ellipsis separates the first

69 Md. App. 325, *; 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

two words of the quoted provisions in appellant's complaint, no additional words are found in the corresponding passage in appellee's Exhibit No. 1; (2) whereas certain words are underscored in the relevant passage in appellant's complaint, they are not so highlighted in appellee's exhibit; (3) the word "purpose" appears in the singular in appellant's complaint, whereas it is in the plural form in appellee's exhibit. Appellant urges these discrepancies raise the inference that the manual disseminated to her when she was initially hired is not the same manual as that displayed by appellee as Exhibit No. 1. At oral argument, attorney for appellee informed the court that the manual submitted as Exhibit No. 1 became effective approximately one month prior to appellant's discharge.

[HN7] Only a genuine dispute as to a material fact will preclude a grant of summary judgment. Rule 2-501(a), Md.Code Ann., Md. Rules (1986); *Mason v. Henderson*, 14 Md. App. 370, 374, 286 A.2d 825 (1972); *Brewer v. Mele*, 267 Md. 437, 441, 298 A.2d 156 (1972). A "material" fact is one which somehow affects the resolution of the case. *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608 (1985); *Washington Homes*, supra, 281 Md. at 716, 382 A.2d 555; *Lynx, Inc. v. Ordnance Products, Inc.*, 273 Md. 1, 8, 327 A.2d 502 (1974).

Appellant has failed to demonstrate how the above discrepancies could affect the outcome of this case. It may well be that the employee manual in effect at the time appellant's employment was terminated is not the same manual which was disseminated to her when she was first hired. Even if the review provisions of the manual in effect at appellant's initial hiring constituted an implied contract, a matter we need not decide here, the later manual would have superseded any earlier editions. By continuing to work for appellee after the new manual's issuance, appellant, by her conduct, impliedly would have assented to a modification of her employment agreement. See generally *United States v. Gilman*, 360 F. Supp. 828 (D.Md. 1973); *Thomas v. Hudson Motor Car Co.*, 226 Md. 456, 174 A.2d 181 (1961); *Cole v. Wilbanks*, 225 Md. 34, 171 A.2d 711 (1961); 17 Am.Jur.2d Contracts §§ 458, 459, 493 (1964 & 1986 Supp.) and cases cited therein.

The minor variations in the manuals noted by appellant are not material for the additional reason that the uncontested existence of a contractual disclaimer is dispositive of the matter at hand. See *infra*, Section III.

-----End Footnotes-----

[**13]

[*791] Our answer to the first issue raised by appellant is that [HN8] concessions in pleadings may serve as a basis for summary judgment even in the absence of affidavits, depositions, or other sworn testimony. Even assuming the trial court erred in basing its summary judgment entry on an unverified exhibit, the pleading admissions of record establish there was a suitable basis for a grant of summary judgment by the court below. It is well-established that [HN9] even where a trial judge has based an entry of summary judgment on an erroneous ground, an appellate court may affirm the judgment on any ground supported by the [*336] record. See 6 Moore's Federal Practice para. 56.27, at p. 56-1561 (1985 & 1986 Supp.) and cases cited therein. n5

-----Footnotes-----

n5. Because Maryland's rule governing summary judgment was modeled after Federal Rule 56(d), federal authority is persuasive. *Berkey*, 287 Md. at 306, 413 A.2d 170.

-----End Footnotes-----

It may be additionally noted that [HN10] party admissions in pleadings, admissible under an exception[***14] to the rule against hearsay, are considered to be substantive evidence of the facts admitted. See *Aetna Casualty & Surety Co. v. Kuhl*, 296 Md. 446, 455, 463 A.2d 822 (1983); *Burkowske v. Church Hospital Corp.*, 50 Md. App. 515, 519, 439 A.2d 40 (1982); 29 Am.Jur.2d Evidence § 687 (1964 & 1986 Supp.).

69 Md. App. 325, *; 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

Even if we had not answered the first issue as we did, we would reach the same ultimate conclusion because our answer to the second issue is that an appellant may not raise for the first time on appeal a question as to the competency, materiality or admissibility of an unverified document relied on by the court in granting summary judgment.

It is well-established that [HN11] objections to the form or admissibility of evidence submitted in support of a motion for summary judgment cannot be raised for the first time on appeal. *Wyand v. Patterson Agency, Inc.*, 266 Md. 456, 460-61, 295 A.2d 773 (1972); *Fishman Construction Co. v. Hansen*, 238 Md. 418, 429, 209 A.2d 605 (1964); *Guerassio v. American Bankers Corp.*, 236 Md. 500, 504-05, 204 A.2d 568 (1964); *Tellez v. Canton Railroad Co.*, 212 Md. 423, 430, 129 A.2d 809 (1957). Only objections relating to the "substantive[***15] deficiency of the affidavit in setting forth the facts necessary for a prima facie case" or defense may be initially raised on appeal. *Wyand*, supra, 266 Md. at 461, 295 A.2d 773. See also, *Mercier v. O'Neill Associates, Inc.*, 249 Md. 286, 287 n. 1, 239 A.2d 564 (1968).

Here, appellant seeks to attack only the form of the document, i.e., the lack of an affidavit or other verification [*337] of the document's authenticity, not the sufficiency of its contents. The document, otherwise inadmissible for its lack of testimonial assurance of authenticity, was accepted and considered by the court in the absence of an objection thereto, and it contained the facts necessary to entitle appellee to summary judgment as a matter of law. Had an objection or motion to strike been made, appellee would have had the opportunity to submit proper authentication. Appellant will not now be heard on appeal to object for the first time to the admission of the exhibit and its consideration by the court. See *P. Niemeyer & L. Richards, Maryland Rules Commentary, Rule 2-501*, at 252 (1984). See also *Rule 2-517(a), Md. Rules, Md. Code Ann.* (1986); *Davis v. Sears, Roebuck & [***16] Co.*, 708 F.2d 862, 864 (1st Cir. 1983); *Noblett v. General Elec. Credit Corp.*, 400 F.2d 442, 445, cert. denied, 393 U.S. 935, 89 S. Ct. 295, 21 L. Ed. 2d 271 (10th Cir. 1968); *Auto Drive-Away Company of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446 (5th Cir. 1966); 10A *Wright, Miller & Kane, Federal Practice and Procedure*, § 2738 at 507-08 (1983) and cases cited therein. n6

-----Footnotes-----

n6. Appellant, relying on *Cottman v. Cottman*, 56 Md. App. 413, 468 A.2d 131 (1980), urges that notwithstanding the failure of a party to preserve the issue below, an appellate court may determine that an affidavit is defective in form and therefore insufficient to support summary judgment entry. In *Cottman*, we held that the trial court erred in granting one defendant's motion for summary judgment where the supporting affidavit failed to state that it was "made on [the] personal knowledge" of the affiant. While the appellant in *Cottman* raised the issue of the affidavit's defectiveness on appeal, the appellees therein made no contention that appellant had failed to preserve the issue. The issue may or may not have been preserved for appellate review in *Cottman*; we simply had no reason to address it. In the case sub judice, however, appellee did raise the issue of appellant's failure to preserve the point for review.

-----End Footnotes-----

[***17]

[**792] III

Having decided that the only material fact which could be disputed by appellant -- the existence of a contractual disclaimer -- was properly considered by the court below, and that appellant is precluded from disputing its existence on [*338] appeal, we turn now to the question of whether, on the basis of the undisputed facts, appellee was entitled to summary judgment as a matter of law.

Briefly summarizing the material facts, we note that appellant was not hired for a term of definite duration and, therefore, was an "at will" employee. *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941). Appellant was discharged after an evaluation hearing without being afforded an evaluation review in accordance with the provisions of a published handbook distributed to employees. The handbook contained a statement that it "does not constitute an express or implied contract." Other provisions of the manual reserved appellee's discretion to "discipline our workforce."

We find no error in the circuit court's determination that on the basis of these facts appellee was entitled to summary judgment as a matter of law.

69 Md. App. 325, *, 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

In [HN12] Maryland, an employment contract of indefinite duration[***18] is considered employment "at will" which, with few exceptions, may be terminated without cause by either party at any time. *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). In two limited situations an "at will" employee may not be discharged without cause. First, the rule that employment contracts of indefinite duration can be legally terminated at any time is inapplicable where the employee is discharged for exercising constitutionally protected rights. *DeBleecker v. Montgomery County*, 292 Md. 498, 506, 438 A.2d 1348 (1982), citing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). See also, *Adler*, supra, 291 Md. at 47, 432 A.2d 464 (abusive discharge in contravention of public policy). This exception is not applicable in the case sub judice. The second exception, adopted by this court in *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md. App. 381, 486 A.2d 798 (1985), cert. denied, 303 Md. 295, 493 A.2d 349 (1985), is similarly of no assistance to appellant.

[*339] In *Staggs*, the appellants, former employees of Blue Cross, did not have[***19] a fixed contract of employment, although all were covered by certain personnel provisions set forth in a policy memorandum. Appellants, appealing a grant of summary judgment in favor of the employer, had alleged that portions of the policy memorandum allowed termination of their employment only for cause. *Id.* at 384, 486 A.2d 798. A provision of the memorandum stated specifically that an employee could be dismissed "at any time for cause." *Id.* at 385, 486 A.2d 798. The policy memorandum further provided that multiple counseling sessions would precede final dismissal. *Id.* at 384-85, 486 A.2d 798.

In *Staggs*, we found that the contracts in dispute, though of indefinite duration, had been so modified by the personnel policy statement as to require an exception to the common law "at will" doctrine. *Id.* at 388, 392, 486 A.2d 798. We held that [HN13] provisions in personnel policy statements "that limit the employer's discretion to terminate an indefinite employment or that set forth a [*793] required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that[***20] are enforceable by the employee." *Id.* at 392, 486 A.2d 798 (emphasis added). Based on the record, we concluded that summary judgment was inappropriate, there being a need for determination at trial whether the employees were in fact dismissed for "cause," as required by the policy memorandum. *Id.* at 393, 486 A.2d 798. We cautioned, however, that "[n]ot every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant." *Id.* at 392, 486 A.2d 798. We warned that, "General statements of policy are no more than that and do not meet the contractual requirements for an offer." *Id.*, quoting *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983).

The disclaimer language in the policy manual quoted in appellee's pleadings does not indicate any intent to limit the [*340] discretion of the appellee to discharge only for cause, as was the case in *Staggs*. Moreover, other portions of the manual quoted in appellee's memorandum actually served to reserve the rights of appellee "to direct and discipline our workforce . . . and to take whatever action is necessary in our judgment to operate [the Defendant [***21]Hospital]." Finally, unlike the situation in *Staggs*, in this case the appellee expressly negated, in a clear and conspicuous manner, any contract based upon the handbook for a definite term and reserved the right to discharge its employees at any time. The provisions for review, when viewed in the larger context, were but "general policy statements" not amounting to an offer of employment for a definite term or requiring cause for dismissal.

Other decisions finding in favor of discharged employees have generally involved reliance by employees on policy manuals or oral promises that limited the discretion of the employer to fire except for cause or that contained job security provisions and pre-dismissal reprimand procedures more detailed than in the case sub judice. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880, 884 (1980) (policy manual allowed discharge "for just cause only"); *Pine River State Bank v. Mettille*, 333 N.W.2d at 626 n. 3 (multiple stage reprimand procedures required before job termination).

While courts of other states have the *Staggs*-type exception to the "at will" doctrine, see, e.g., *Hammond [***22] v. North Dakota State Personnel Bd.*, 345 N.W.2d 359, 361 (N.D. 1984); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275, 277 (S.D. 1983); *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1067 (Utah 1981), the cases have also recognized [HN14] an employer may avoid contractual liability by any terms which clearly and conspicuously disclaim contractual intent. See *Toussaint*, 292 N.W.2d at 891, *Pine River*, 333 N.W.2d at 627. This court specifically relied on *Toussaint* and *Pine River* in *Staggs*. 61 Md. App. at 389-390, 486 A.2d 798. See also, *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 455 (6th Cir. 1986); *Fletcher v. Wesley [*341] Medical Center*, 585 F. Supp. 1260, 1264 (D.Kan. 1984);

69 Md. App. 325, *; 517 A.2d 786, **;
1986 Md. App. LEXIS 423, ***; 1 BNA IER CAS 1374

Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480, 1488 (E.D.Mich. 1983); Crain v. Burroughs Corp., 560 F. Supp. 849, 852 (C.D.Cal. 1983); Summers v. Sears, Roebuck & Co., 549 F. Supp. 1157, 1161 (E.D.Mich. 1982); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307, 310-11 (1981); Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170, 174 (1984).

[HN15] The purpose of the Staggs exception to the at will doctrine [***23] is to protect the legitimate expectations of employees who have justifiably relied on manual provisions precluding job termination except for cause. See, e.g., Toussaint, supra, 292 N.W.2d at 895. [**794] Justifiable reliance is precluded where, as in the case at hand, contractual intent has been expressly disclaimed.

Appellant's final contention, that the disclaimer provision of the hospital manual should not be enforced because it is inequitable, is without merit. Appellant has cited no cases which would support such a contention. In the non-commercial [HN16] context, courts are reluctant to strike provisions within agreements voluntarily entered into between the parties in the absence of fraud, mistake or oppression. 17 Am.Jur.2d Contracts § 192 (1964) and cases cited therein. There were no contentions of fraud, mistake or oppression in this case.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

CHESAPEAKE PUBLISHING CORPORATION v. DAVID M. WILLIAMS
No. 136, September Term, 1994

COURT OF APPEALS OF MARYLAND

339 Md. 285; 661 A.2d 1169; 1995 Md. LEXIS 97

July 24, 1995, Filed

PRIOR HISTORY: [***1] Certiorari to the Court of Special Appeals (Circuit Court for Kent County). J. Frederick Price JUDGE.

DISPOSITION: JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. COSTS IN THE COURT OF SPECIAL APPEALS AND IN THIS COURT TO BE PAID BY THE RESPONDENT.

CASE SUMMARY:

PROCEDURAL POSTURE: Certiorari was granted to review an order of the Court of Special Appeals (Maryland), which reversed a ruling by the circuit court granting judgment to defendant newspaper publisher under Md. R. Civ. P., Cir. Ct. 2-519, in plaintiff attorney's action for defamation.

OVERVIEW: The attorney filed suit against a newspaper publisher for defamation after an article about the attorney's massive letter-writing campaign against the judge who ruled against him in his child custody case. The trial court granted the publisher's motion for judgment pursuant to Md. R. Civ. P., Cir. Ct. 2-519. The intermediate appellate court reversed. The court granted certiorari, and ruled that the attorney was a public figure due to his letter-writing campaign, which had involved over 1,000 mailings. Thus, he had to prove by clear and convincing evidence that the statements in the article were defamatory, false, and made with "actual malice." Actual malice required showing that a statement was made with knowledge that it was false or with reckless disregard of whether it was false. The court explained that there was a qualified privilege to report on legal proceedings even if the story contained defamatory material, as long as the account was fair and substantially accurate. The factual material pertaining to the custody dispute, which came from the official court file, was substantially accurate and the evidence of actual malice was insufficient to send the case to the jury.

OUTCOME: The court reversed the judgment of the intermediate appellate court.

CORE TERMS: actual malice, defamatory, custody, daughter, falsity, defamation, publisher, reporter, chair, voter, hurt, clear and convincing evidence, public figure, child abuse, accusation, threw, defamatory statement, custody dispute, turner, quotation, libelous, reckless disregard, defamation action, election, grabbed, First Amendment, reporting, Maryland Rule, allegedly defamatory, qualified privilege

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Trials: Judgment as Matter of Law

[HN1] According to Md. R. Civ. P., Cir. Ct. 2-519(b), when a motion for judgment is made after the close of the plaintiff's case in a jury trial, the court must consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] Under both Maryland and federal law the First Amendment of the United States Constitution requires that before a public figure may recover for defamation, clear and convincing evidence must establish that the statements in issue were: (1) defamatory in meaning; (2) false; and (3) made with "actual malice." In determining the defamatory quality of a publication, which is a question of law for the court, the article must be read as a whole. The threshold question of

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

whether a publication is defamatory in and of itself, or whether, in light of the extrinsic facts, it is reasonably capable of a defamatory interpretation, is for the court upon reviewing the statement as a whole. Words have different meanings, depending on the context in which they are used, and a meaning not warranted by the whole publication should not be imputed. The test is whether the words, taken in their common and ordinary meaning, in the sense in which they are generally used, are capable of defamatory construction.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN3] A defamatory statement is one which tends to expose a person to public scorn, hatred, contempt, or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person. As to the second criterion, a false statement is one that is not substantially correct. The burden of proving falsity is on the plaintiff; truth is not an affirmative defense. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting," of the libelous charge be justified.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN4] In Maryland, there exists a qualified privilege to report on legal proceedings even if the story contains defamatory material, as long as the account is fair and substantially accurate. Operating in tandem with the absolute privilege accorded participants in court proceedings is a lesser privilege, alternatively described as qualified, conditional, or special, given to persons who report to others defamatory statements uttered during the course of judicial proceedings. Reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct or substantially accurate accounts of what took place.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN5] Traditionally, in a defamation action, a qualified privilege will only be forfeited upon a showing of actual malice. However, the modern view discards the search for malice. The privilege exists even if the reporter of defamatory statements made in court believes or knows them to be false; the privilege is abused only if the report fails the test of fairness and accuracy. Finally, the fair reporting privilege reaches, not only comprehensive accounts of judicial proceedings, but also accounts focusing more narrowly on important parts of such proceedings.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN6] If a plaintiff fails to meet the burden of proving the presence of actual malice, any conditional privilege that exists will not be overcome and a public figure cannot have been defamed.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN7] In order for a person to be held liable for defaming a public figure, actual or constitutional malice must be shown. Proving actual malice requires clear and convincing evidence that a statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN8] While "reckless disregard for the truth" is not easily defined, it means having either a high degree of awareness of probable falsity or entertaining serious doubts as to the truth of the challenged statements. Actual malice cannot be established merely by showing that the publication was erroneous, derogatory, or untrue, the publisher acted out of ill will, hatred, or a desire to injure the official, the publisher acted negligently, or the publisher acted without undertaking the investigation that would have been made by a reasonably prudent person. Moreover, malice is not established if there is evidence to show that the publisher acted on a reasonable belief that the defamatory material was "substantially correct," and there was no evidence to impeach the publisher's good faith.

Evidence: Procedural Considerations: Inferences & Presumptions

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] The burden is on the plaintiff in a defamation case to prove the existence of actual malice by clear and convincing evidence.

Civil Procedure: Appeals: Standards of Review: De Novo Review

Constitutional Law: Fundamental Freedoms: Freedom of Speech

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

[HN10] An appellate court must make an independent examination of the whole record in First Amendment cases so as to be assured that the lower court's judgment does not constitute a forbidden intrusion on the field of free expression.

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN11] In reviewing a grant of a motion for judgment in favor of the defendant in a defamation case, an appellate court must consider the evidence in the light most favorable to the plaintiff and determine whether he presented clear and convincing evidence that would allow a reasonable fact-finder to conclude that the communication in question contained statements that were defamatory, false, and made with actual malice.

Civil Procedure: Trials: Judgment as Matter of Law

[HN12] The inquiry involved in a ruling on a motion for judgment necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. Therefore, where the First Amendment mandates a "clear and convincing" standard, the trial judge in disposing of a motion for judgment shall consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN13] Information from court files is protected by a qualified privilege, which can only be forfeited if a reporter's account of the legal proceeding in question fails to be fair or substantially accurate.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN14] In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN15] A deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of New York Times Co. and Gertz, unless the alteration results in a material change in the meaning conveyed by the statement.

COUNSEL: ARGUED BY David R. Thompson (Cowdrey, Thompson & Karsten, P.A., on brief) of Easton, MD, FOR PETITIONER.

ARGUED BY David M. Williams of Chestertown, MD, FOR RESPONDENT.

JUDGES: ARGUED BEFORE Murphy, C.J.; Eldridge, Rodowsky, Chasanow, Karwacki, Bell, and Raker, JJ.
Concurring opinion by Chasanow, Bell, and Raker, JJ.

OPINIONBY: MURPHY

OPINION: [*288]

[**1170] OPINION BY MURPHY, C.J.

Chasanow, Bell and Raker, JJ.,concur.

Filed: July 24, 1995

In this case we must determine whether the evidence presented by Petitioner David M. Williams about an allegedly libelous newspaper article was sufficient to support a defamation judgment against Respondent Chesapeake Publishing Corporation (Chesapeake).

I.

339 Md. 285, *, 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

The defamation action arose out of an acrimonious child custody dispute between [**1171] Williams and his former wife, Joan B. Turner, which began in 1978. In September, 1984, Turner obtained a temporary custody order from the Juvenile and Domestic Relations District[***2] Court for Gloucester County, Virginia, the court stating that it found sufficient evidence "of abuse . . . to warrant an . . . order allowing [Turner] to retain [her] child's custody temporarily but conditioned upon her immediately filing custody . . . or abuse proceedings in the state of Maryland." On September 14, 1984, Turner filed a petition for custody in the Circuit Court for Talbot County, which included allegations of child abuse and an affidavit from police officer Thomas Gross describing an incident of abuse reported to him by the child and his observation of bruises consistent with the child's account. That incident, which became central to the custody proceeding, involved the child's claim that her father, Williams, grabbed her by the arm, tossed her against a wall, and threw a chair at her. [*289]

A custody hearing was held on September 17, 1984 and, with consent of the parties, the court (North, J.) met with the child alone in chambers at which time the child repeated her description of the chair incident and expressed her desire to live with her mother. In a written statement summarizing the proceedings, the court decided to leave temporary custody with Turner. Williams [***3]nevertheless continued to pursue custody of his child through the winter and spring of 1985, but to no avail.

In May of 1985, dissatisfied with his treatment in the courts, Williams circulated a letter to at least one thousand Talbot County voters, members of the Maryland General Assembly, and others involved in state politics. The letter urged voters to be wary of legislative action that would take away their constitutional right to elect judges to the Maryland circuit court. To demonstrate the need to retain this power, Williams proceeded to detail the facts of his own custody case, describing what he perceived to be improper conduct by Judge North, which, according to Williams, resulted in the court arbitrarily awarding custody of his child to her mother who was unfit. The letter did not mention that he was discussing his own custody dispute nor did it report any of the abuse allegations, which played a major role throughout the proceeding.

In June of 1985, Williams's letter came to the attention of Pat Emory, a reporter employed by Chesapeake. She telephoned Williams and, according to his testimony, informed him that she had received his voter letter and wanted to publish it, [***4] but that she needed more information about it first. Williams claims that he only spoke with Emory because he believed that she intended to publish his letter. Williams later testified that he told Emory that the custody dispute described in the correspondence was his own, but that he did not feel that it was necessary, or proper, to say that in the letter. He also said that he told her about the abuse allegations made by his former wife and daughter, explaining that the accusations were false and that, following an investigation, the Department of Social Services chose not to take any official [*290]action with regard to them. As to the alleged chair incident, which he insisted involved no physical abuse and simply amounted to a father disciplining his daughter for lying, Williams told Emory that he "hurt [his daughter's] feelings when [he] disciplined her, which is what [he] intended to do." He maintained that while he may have grabbed his daughter's arm and shook her, he never threw a chair at her. Williams encouraged Emory to verify his story by reviewing the extensive court file pertaining to the custody case.

On June 27, 1985, a newspaper article discussing Williams's letter[***5] as well as his custody battle appeared in The Star Democrat, a Chesapeake-owned paper published in Talbot County. The same text, with a different headline ("David Williams Initiates Campaign to Reclaim Child"), appeared on July 3, 1985 in the Kent County News, a Chesapeake-owned paper published in Kent County. The entire piece read as follows with the allegedly defamatory portions highlighted: "Attorney Targets Talbot Judge

"A Chestertown lawyer has initiated a one-man letter-writing campaign he says is intended to save Marylanders' constitutional right to elect circuit court judges.

[**1172] "He said his crusade comes after an unsuccessful, year-long effort to reclaim custody of his daughter, whom a judge removed from his home last year.

"The lawyer, David M. Williams, says he has mailed more

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

than 1,000 copies of a three-page letter detailing the custody case to voters in Talbot County. He says he'll keep mailing the letters 'until they lock me up'.

"The letter urges voters to stand up for their right to elect judges.

"'You never know when you'll need to exercise your vote in that way, but if it's gone, where do you turn?' Williams asks.

[***6]

"The letter also targets Talbot County Circuit Court Judge John C. North II. It portrays him as an insensitive judge who removed a child from her father's comfortable[*291] Kent County home and put her with a mother whom Williams depicts as unfit.

"Williams says his daughter is living in a camper on the back of a pickup truck. 'On cold nights she kept warm by using a space heater and sleeping with a dog,' his letter claims.

"'You wouldn't think they could take my kid away from me for non-existent child abuse,' he said.

"Child abuse is not mentioned in the letter. It also doesn't mention that Williams allegedly bruised the girl when he grabbed her, that he threw a chair at her or that he threw her against the wall, all of which he says is true.

"'I hurt her a little,' Williams admitted in a recent telephone interview.

"A school psychologist describes the child as having 'intense dislike and frustration concerning her father.'

"Philip Carey Foster, a court-appointed lawyer representing the child, said child abuse allegations made by the mother were never confirmed. Law enforcement agencies also didn't pursue any criminal[***7] prosecution.

"Also unmentioned in Williams' letter are accusations of physical abuse, drunkenness and temper fits, accusations made in court by two wives and Williams' daughter. Williams says the charges were fabricated or occurred long ago.

"Waller Hairston of Easton, the lawyer for Joan Turner of Virginia, Williams' ex-wife, said, 'I don't think the letter is appropriate by any stretch of the imagination. I don't want to involve the details of that case in the press.'

"Judge North also declined to respond to the letter.

"'I can't respond in any fashion. My hands are tied by judicial ethics,' North said.

"Another set of judges has essentially answered Williams' charge that North is incompetent. When Williams took his complaints to the Commission on Judicial Disabilities, which can remove a judge from office, the commission completed a [*292]preliminary study and found no reason to continue an investigation against North.

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

"The custody case has been in almost every court on the Upper Eastern Shore. So much paper has been filed in the case that it stacks 2 feet high in a cardboard box in North's office. Evidence even includes a tooth. [***8] Court officials describe the case as the 'perfect television soap opera.'

"Williams' letter has publicized the case, but it wasn't exactly a private matter before then. The director of Kent County's Department of Social Services and several of his employees have been sued by Williams because of their involvement in the case.

"Williams admits that the case has consumed much of his time but would not say how much it has cost him. He said he has spent at least \$220 in stamps on the first mailing of 1,000 letters.

"At present, circuit court judges in Maryland are appointed by the governor, then approved or rejected by voters in the next election. North, appointed to the circuit court in 1983, was unopposed and elected to a 15-year term last fall.

"District court judges are appointed by the governor to 10-year terms and do not stand for election.

"Some leaders, including Gov. Harry Hughes, want to relieve circuit court [**1173] judges of their obligations to stand election. But an effort in that direction failed during last winter's General Assembly session.

"Williams recently ran unsuccessfully against Judge George B. Rasin Jr. of Kent County, [***9] chief judge of the Second Judicial Circuit, of which North is a part. Williams claims that race may have prejudiced other judges against him.

"By taking his case to the public, Williams says he hopes to 'correct what I call a cancer. We're losing a little more of our individual rights.'

"'I'm a hurt person. I'm very disappointed in the system, disappointed that this could happen.'

[*293]

"North, who has asked the Department of Social Services to find a foster home for Williams' daughter, sees another victim.

"'The real tragedy of this whole thing is the poor little girl who has been torn one way and another,' he said."

On July 22, 1985, Williams filed suit in the United States District Court for the District of Maryland against multiple defendants. The complaint included a defamation claim against Chesapeake in which Williams alleged that certain statements made in the article published by its subsidiaries were defamatory per se in that they accused him of abusing his child in violation of Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 35A and of committing common law assault and battery.

Chesapeake moved to dismiss the federal court action[***10] for lack of jurisdiction. The court allowed limited discovery on the jurisdictional issue, otherwise staying the federal proceedings pending resolution of the ongoing custody litigation in Maryland state court. On December 26, 1990, the federal court granted Chesapeake's motion to

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

dismiss, concluding that there was no factual basis for diversity jurisdiction and no legal basis for pendent jurisdiction in the case. See *Williams v. Anderson*, 753 F. Supp. 1306 (D.Md. 1990). Within 30 days of this dismissal, but more than five years after the initial publication of the article in question, Williams re-filed his defamation suit in the Circuit Court for Kent County. Chesapeake moved to have the state court action dismissed as untimely filed, which was denied.

On February 23, 1993, the court granted a motion for partial summary judgment in favor of Chesapeake, determining Williams to be a public figure for purposes of this case. n1 A[*294] jury trial was held and, at the conclusion of Williams's presentation of evidence, Chesapeake moved for judgment pursuant to Maryland Rule 2-519. n2 The court granted the motion, finding that the article, when taken as a whole, was not defamatory. It concluded[***11] that the piece contained substantially accurate summaries of matters described in court proceedings, which are conditionally privileged. Moreover, it determined that there was insufficient evidence of actual malice to allow the case to go to the jury.

-----Footnotes-----

n1 This determination, undisputed on appeal, was based on several factors, including Williams' candidacy for judgeship on the Circuit Court for Kent County in 1978, for state senator from the 36th Election District in 1982, and, most importantly, his correspondence with at least 1,000 voters in Talbot County concerning the election of state court judges. The court concluded that "the letter in question clearly is purposeful activity on his part amounting to a thrusting of his personality into the vortex of a public controversy. . . . In writing the letter and in distributing it to 1,000 persons and to the members of the General Assembly, he entered upon a campaign to lead in the determination of policy in this important public matter. . . . The press, at that point, had a legitimate and substantial interest in the letter and in the comments made by Mr. Williams therein." As a result of his designation as a public figure, Williams was required to prove that Chesapeake acted with actual malice in publishing the allegedly defamatory article. See *A.S. Abell Co. v. Barnes*, 258 Md. 56, 67-68, 265 A.2d 207 (1970), cert. denied, 403 U.S. 921, 91 S. Ct. 2224, 29 L. Ed. 2d 700 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155-56, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).
[***12]

n2 [HN1] According to Rule 2-519(b), when a motion for judgment is made after the close of the plaintiff's case in a jury trial, the court must consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

-----End Footnotes-----

On August 6, 1993, Williams appealed to the intermediate appellate court, which reversed [***1174] the circuit court judgment. The court held (1) that the suit was not barred by the statute of limitations in light of the provisions of Maryland Rule 2-101(b), which the court interpreted as requiring a retrospective application; n3 (2) that the elements of defamation were established by the evidence; and (3) that the trial court erred in granting judgment in favor of Chesapeake at the close of[*295] the plaintiff's case. See *Williams v. Chesapeake Publishing*, 101 Md. App. 263, 646 A.2d 1031 (1994). We granted certiorari to consider the important issues raised in this case.

-----Footnotes-----

n3 Rule 2-101(b) states that "if an action is filed in a United States District Court . . . within the period of limitations prescribed by Maryland law and the foreign court enters an order of dismissal for lack of jurisdiction, . . . an action filed in this State within 30 days after the foreign court's order of dismissal shall be treated as timely filed in this State."

-----End Footnotes-----

[***13]

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

II.

It is well-settled [HN2] under both Maryland and federal law that "the First Amendment of the United States Constitution requires that before a public figure may recover for defamation, clear and convincing evidence must establish that the statements in issue were: (1) defamatory in meaning, (2) false, and (3) made with 'actual malice.'" *Batson v. Shiflett*, 325 Md. 684, 722, 602 A.2d 1191 (1992) (citations omitted). See also *Rosenberg v. Helinski*, 328 Md. 664, 675, 616 A.2d 866 (1992), cert. denied 125 L. Ed. 2d 727, 113 S. Ct. 3041 (1993); *Hearst Corporation v. Hughes*, 297 Md. 112, 120, 466 A.2d 486 (1983).

In determining the defamatory quality of a publication, which is a question of law for the court, the article must be read as a whole. *Batson*, supra, 325 Md. at 723. We have held: "The threshold question of whether a publication is defamatory in and of itself, or whether, in light of the extrinsic facts, it is reasonably capable of a defamatory interpretation is for the court upon reviewing the statement as a whole; words have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed." [***14] *Id.* See also *Heath v. Hughes*, 233 Md. 458, 464, 197 A.2d 104 (1964); *Hohman v. A.S. Abell Co.*, 44 Md. App. 193, 197, 407 A.2d 794 (1979). As we have stated, "the test is whether the words, taken in their common and ordinary meaning, in the sense in which they are generally used, are capable of defamatory construction." *Batson*, supra, 325 Md. at 724 n. 14.

According to *Batson*, [HN3] "[a] defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or[*296] dealing with, that person." 325 Md. at 722-23. See also *Rosenberg*, supra, 328 Md. at 675. As to the second criterion, "[a] false statement is one that is not substantially correct. The burden of proving falsity is on the plaintiff; truth is not an affirmative defense." *Batson*, supra, 325 Md. at 726 (citation omitted). See also *Metromedia, Inc. v. Hillman*, 285 Md. 161, 169, 400 A.2d 1117 (1979); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 597, 350 A.2d 688 (1976). We have held that "minor inaccuracies do not amount to falsity so long as 'the substance, the gist, [***15] the sting, of the libelous charge be justified.'" *Batson*, supra, 325 Md. at 726 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)).

[HN4] In Maryland, there exists a qualified privilege to report on legal proceedings, even if the story contains defamatory material, as long as the account is fair and substantially accurate. *Rosenberg*, supra, 328 Md. at 677. See also *Batson*, supra, 325 Md. at 727; Restatement (Second) of Torts § 611 (1977). In *Rosenberg*, we held that

"operating in tandem with the absolute privilege accorded participants in court proceedings is a lesser privilege, alternatively described as qualified, conditional, or special, given to persons who report to others defamatory statements uttered during the course of judicial proceedings. . . . Reports of in-court proceedings containing [***1175] defamatory material are privileged if they are fair and substantially correct or substantially accurate accounts of what took place."

328 Md. at 677. [HN5] Traditionally, in a defamation action, a qualified privilege will only be forfeited upon a showing of actual malice. n4 *Id.* at 677-78.[***16] [*297] *Rosenberg* reveals that, with respect to the fair reporting privilege, however, "the modern view discards the search for malice . . . The privilege exists even if the reporter of defamatory statements made in court believes or knows them to be false; the privilege is abused only if the report fails the test of fairness and accuracy." *Id.* at 678 (citations omitted). See also Restatement (Second) of Torts § 611 (1977). Finally, "the fair reporting privilege reaches not only comprehensive accounts of judicial proceedings, but [also] accounts focusing more narrowly on important parts of such proceedings." *Rosenberg*, supra, 328 Md. at 682.

-----Footnotes-----

n4

This is the same standard as is required to prove defamation of a public figure, knowledge of falsity or reckless disregard for the truth. See *infra*. So [HN6] if a plaintiff fails to meet the burden of proving the presence of actual malice, any conditional privilege that exists will not be overcome and a public figure cannot have been defamed.

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

-----End Footnotes-----

Finally, [HN7] [***17] in order for a person to be held liable for defaming a public figure, actual or constitutional malice must be shown. Proving actual malice requires "clear and convincing evidence that a statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" Batson, supra, 325 Md. at 728 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). See also *Hearst*, supra, 297 Md. at 120; *Capital-Gazette Newspapers v. Stack*, 293 Md. 528, 538, 445 A.2d 1038, cert. denied, 459 U.S. 989, 103 S. Ct. 344, 74 L. Ed. 2d 384 (1982); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (extending the *New York Times* rule to public figures).

We have held that [HN8] "while 'reckless disregard for the truth' is not easily defined, it does mean having either [a] 'high degree of awareness of . . . probable falsity' or 'entertaining serious doubts' as to the truth of the challenged statements." Batson, supra, 325 Md. at 729 (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)). See [***18] also *Gertz*, supra, 418 U.S. at 334-35 n.6; *St. Amant v. Thompson*, 390 U.S. 727, 730-31, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); *Garrison v. Louisiana*, [***298] 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). We have further held that

"actual malice' cannot be established merely by showing that: the publication was erroneous, derogatory or untrue, the publisher acted out of ill will, hatred or a desire to injure the official, the publisher acted negligently, . . . or the publisher acted without undertaking the investigation that would have been made by a reasonably prudent person. Moreover, malice is not established if there is evidence to show that the publisher acted on a reasonable belief that the defamatory material was "substantially correct" and 'there was no evidence to impeach the [publisher's] good faith."

Batson, supra, at 729 (quoting *Capital-Gazette*, supra, 293 Md. at 539-40 (citations omitted)). On the other hand,

"actual malice' can be established by showing that: a defamatory statement was a calculated falsehood or lie 'knowingly and deliberately published[;]' a defamatory statement was the product of the [***19] publisher's imagination; a defamatory statement was so inherently improbable that only a reckless person would have put it in circulation; or the publisher had obvious reasons to distrust the accuracy of the alleged defamatory statement or the reliability of the source of the statement."

Capital-Gazette, supra, 293 Md. at 539 (citations omitted). [HN9] The burden is on the plaintiff to prove the existence of actual malice by clear and convincing evidence. Batson, supra, 325 Md. at 728. [***1176] See also *Capital-Gazette*, supra, 293 Md. at 540-41; *Berkey v. Delia*, 287 Md. 302, 318-20, 413 A.2d 170 (1980); *A.S. Abell Co. v. Barnes*, supra, 258 Md. at 77.

III.

Williams points to five specific statements in Chesapeake's article, which he claims are defamatory in that they accuse him of felonious child abuse and of common law assault and [***299] battery. We shall consider each of these contentions after making our own independent examination of the record in the case, as the governing law requires. Batson, supra, 325 Md. at 722. See also *A.S. Abell Co. v. Barnes*, supra, 258 Md. at 72 (stating that [HN10] "we must 'make an independent examination of the whole [***20] record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression"); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508-11, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (reiterating the importance of independent appellate review in First Amendment cases); *Time, Inc. v. Pape*, 401 U.S. 279, 284, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971); *New York Times*, supra, 376 U.S. at 284-85.

First, we shall assume, without deciding, that Williams's defamation suit was timely filed in state court. Accordingly, we will decide the case on its merits. Because we are [HN11] reviewing a grant of a motion for judgment in favor of Chesapeake, we must consider the evidence in the light most favorable to Williams and determine whether he presented clear and convincing evidence, which would allow a reasonable fact-finder to conclude that the article in question contained statements that were defamatory, false, and made with actual malice. *Masson*, supra, 501 U.S. at 508. See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), concluding that:

[HN12]

"the inquiry involved in a ruling[***21] on a motion for . . . [judgment] necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. . . . [Therefore], where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a [motion for judgment] should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity."

As we have duly noted, the publication here at issue is a newspaper article, discussing the letter Williams sent to Maryland voters and what the reporter determined to be Williams's[*300] impetus for doing so, namely his unsuccessful battle for custody of his child. The information and opinions expressed in the article were based upon a comprehensive review of the court file in the custody dispute and interviews with various participants in the case. We believe that the publication, if taken as a whole, is a fair and substantially accurate account of what has clearly been a protracted and complex court proceeding. When read in its entirety, the reporter's presentation is objective, offering Williams's views, the perspectives of others involved [***22] in the case, and her own observations of the events surrounding this high profile custody battle.

The first allegedly libelous paragraph reads: "'You wouldn't think they could take my kid away from me for non-existent child abuse,' he said." The second paragraph states: "Child abuse is not mentioned in the letter. [The Williams letter] also doesn't mention that Williams allegedly bruised the girl when he grabbed her, that he threw a chair at her or that he threw her against the wall, all of which he says is true." While the second paragraph is arguably defamatory if taken on its own, when read in conjunction with the preceding statement, it is clear that Emory acknowledges that Williams denied ever having abused his child. It is beyond reason that she would print Williams's denial of the abuse charges in one sentence and then immediately attempt to suggest that he admitted to such allegations in the next paragraph. Therefore, we conclude that her comment pertaining to Williams's recognition of the truth of the statements in the second paragraph must have been intended to convey that Williams conceded that neither the subject of child abuse in general nor the [**1177] specific allegations[***23] about the chair incident were mentioned in his letter, which is true, and not that he confessed to harming his child. Further evidence that Emory treated the abuse charges as unsubstantiated is that, just following these allegedly defamatory statements, she writes that even the child's court-appointed attorney conceded that the abuse allegations were never confirmed and that no criminal prosecution was pursued. In keeping with this, we cannot conclude that[*301] the article intended to suggest that Williams confessed to abusing his child.

The next paragraph reads: "'I hurt her a little,' Williams admitted in a recent telephone interview." Williams testified that he never told Emory that he physically hurt his daughter, as he claims this statement implies; instead, he insists that what he actually said was "I hurt [my daughter's] feelings when I disciplined her, which is what I intended to do." We do not believe that this alleged misrepresentation of Williams' comment on this subject amounts to an accusation of criminal conduct as he contends. This is especially true since the statement does not actually say that Williams admitted to physically harming his child, which is consistent[***24] with his previous denial of the abuse earlier in the article. Furthermore, we conclude that the gist of the quotation as written is not substantially different from what Williams claims to have actually said.

The fourth statement that Williams complains about states that "[a] school psychologist describes the child as having 'intense dislike and frustration concerning her father.'" This assertion is true and true assertions, no matter how damaging to a plaintiff's reputation, can never provide the basis for a defamation action. Material found in the court file supports Emory's comments in this regard and are, at least, substantially correct. One document states: "[Lori] experiences considerable anxiety and fearfulness, much of which appears associated with her relationship with the paternal figure towards whom she evidences intense rage at the present time."

The final paragraph that Williams is challenging states: "Also unmentioned in Williams' letter are accusations of physical abuse, drunkenness and temper fits, accusations made in court by two wives and Williams' daughter. Williams says the charges were fabricated or occurred long ago." These statements are also true, which[***25] was conceded by Williams at trial; however, he claims that Emory should have also written that these allegations had, in his opinion, been determined to be[*302] unfounded in earlier court proceedings. To do so, however, was not the reporter's obligation.

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

The factual material pertaining to the custody dispute, which was used by Emory in writing her article, including the information about the psychologist reports and the prior allegations made against Williams by his family members, came [HN13] from the court file in the case. Such material is protected by a qualified privilege, which can only be forfeited if the reporter's account of the legal proceeding in question fails to be fair or substantially accurate, neither of which is true in the instant case. n5

-----Footnotes-----

n5 The traditional view posits that actual malice is needed in order to overcome the fair reporting privilege; however, we need not express a preference for a particular standard in this case because Chesapeake would be protected under either one since the record is barren of any evidence that it acted with malice in publishing its article about Williams.

-----End Footnotes-----

[***26]

Finally, even if we assume that some of the allegedly libelous statements in this case are both defamatory and false, after a careful review of the record, we conclude that there was not a sufficient showing of actual malice to send this case to the jury. In fact, the only evidence of actual malice presented by Williams at trial was his testimony that Chesapeake published the libelous article because he had represented clients against the publisher in the past, albeit unsuccessfully, and the CEO of the corporation was annoyed at the extent to which the litigation had dragged on. Evidence was also presented, however, establishing that Williams has often felt conspired against in this nature in the past, which is evidenced by the numerous, unfounded lawsuits he has brought against virtually every person involved [**1178] in his daughter's custody case. n6 In fact, Williams brought a defamation claim against KCDSS and its director in which he made[*303] virtually identical allegations on the issue of actual malice as the ones we are reviewing in the instant case. The suit claimed that the defendants were motivated by spite and ill will directed towards him because, in 1981, he had represented a case[***27] worker against them in an employment dispute. We do not accept Williams's conclusion that Chesapeake was retaliating against him for bringing lawsuits against it in the past in his capacity as an attorney.

-----Footnotes-----

n6 Williams has sued five Maryland circuit court judges, a judicial law clerk, his ex-wife's attorney, his daughter's court-appointed attorney, several social workers, the director of the Kent County Department of Social Services (KCDSS), four county governments, and his ex-wife among others.

-----End Footnotes-----

Williams also contends that when Emory misquoted him about whether he "hurt" his daughter in the chair incident, her actions constituted actual malice. The Supreme Court has made the following observations about improper quotations: [HN14]

"In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. . . . A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might[***28] injure because it attributes an untrue factual assertion to the speaker. . . . Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold."

Masson, supra, 501 U.S. at 511-12. The Court held that [HN15] "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of New York Times Co. . . . and Gertz . . . unless the alteration results in a material change in the meaning conveyed by the statement." Id. at 517. In the instant case, there was not clear and convincing evidence that the inaccuracy of the quote in question was deliberate and, furthermore, after comparing the language attributed to Williams with the statements that he admitted to making, we conclude that the

339 Md. 285, *; 661 A.2d 1169, **;
1995 Md. LEXIS 97, ***

meaning of his intended statement was not materially changed by Emory's alteration; the quote would likely have the same effect on a reader either way it was written.

[*304]

Finally, Williams contends[***29] that because he explained to Emory his version of what occurred with regard to the events surrounding his custody dispute, the reporter acted with knowledge of falsity and/or reckless disregard for the truth when she printed an article that presented other sides of this complicated story. We do not think that a reputable reporter would accept, at face value, the facts of a story from a single participant without further investigation. Emory simply did her job; she looked into what Williams told her and gave a full account of what she uncovered. Therefore, applying the principles set forth in Batson, we conclude that there was no evidence that Chesapeake had either a high degree of awareness of the probable falsity of any of the statements made in the article in question or that it entertained any serious doubts as to the publication's truth. In fact, the evidence shows that Chesapeake acted on a reasonable belief that the statements in its article were substantially correct and nothing was presented to impeach its good faith. Accordingly, employing the requisite clear and convincing evidence standard, we find insufficient proof of actual malice upon which to find Chesapeake liable [***30]for defamation and, therefore, hold that the case was properly withheld from the jury.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. COSTS IN THE COURT OF SPECIAL APPEALS AND IN THIS COURT TO BE PAID BY THE RESPONDENT.

CONCURBY: CHASANOW; BELL; RAKER

CONCUR:

Concurring Opinion by Chasanow,

Bell, and Raker, JJ.

Filed: July 24, 1995

[**1179] Judges Chasanow, Bell, and Raker concur in the result only because we believe the action is barred by the statute of limitations. Maryland Rule 2-101(b) should not be applied retrospectively to toll limitations where the time for filing the action has run years before the tolling rule was adopted by this Court in 1992.

CHRISTIAN E. CHINWUBA v. STEVEN B. LARSEN, ET AL.
No. 2298, September Term, 2000

COURT OF SPECIAL APPEALS OF MARYLAND

142 Md. App. 327; 790 A.2d 83; 2002 Md. App. LEXIS 16

January 31, 2002, Filed

SUBSEQUENT HISTORY: [***1] Writ of certiorari granted: Larsen v. Chinwuba, 2002 Md. LEXIS 244.

PRIOR HISTORY: APPEAL FROM THE Circuit Court for Baltimore City. Joseph H.H. Kaplan, JUDGE.

DISPOSITION: Some judgments affirmed and others vacated. Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff health maintenance organization (HMO) owner appealed a judgment of the Baltimore City Circuit Court (Maryland) dismissing his complaint against defendant Maryland Insurance Commissioner and his agency for defamation, false light violation of privacy, abuse of process, and due process violations.

OVERVIEW: While the owner's HMO was under investigation by the Maryland Insurance Administration, but during a period in which only limited public disclosure of information was permitted by Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.), the insurance commissioner shared information with two major newspapers and others. After holding that the owner's tort action was properly consolidated with other actions involving the HMO, in another county, to assure uniformity and avoid confusion, the appeals court agreed that the owner's failure to serve notice of claim on the state treasurer, as required by the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), doomed his claims against the agency and its commissioner in his public capacity. The commissioner's disclosures in direct contravention of the statute, however, were outside the scope of employment as a matter of law, opening him to possible personal liability, unprotected, for the most part, by absolute privilege.

OUTCOME: The court affirmed the dismissal of all the counts against the agency and against the commissioner in his official capacity, but it vacated the dismissal of the defamation and privacy false light claims against the commissioner in an individual capacity, and remanded for further proceedings.

CORE TERMS: duty, absolute privilege, disclosure, governmental immunity, confidentiality, false light, defamation, defamatory, notice, certification, tortious, malice, conditional privilege, receivership, immunity, substantial compliance, claimant, summary judgment, public official, nondisclosure, insurance commissioner, media, medical equipment, motive, bare, qualified immunity, publish, ownership, scope of employment, absolute immunity

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action
[HN1] In reviewing the dismissal of a complaint, the Court of Special Appeals of Maryland credits the allegations of the complaint, and draws all reasonable inferences in favor of the plaintiff.

Civil Procedure: Venue: Change of Venue Generally
[HN2] See Md. R. 2-327(d).

Civil Procedure: Venue: Change of Venue Generally
[HN3] Where a litigant is faced with a real multiplicity of suits involving the same issues, Md. R. 2-327(d) furnishes the appropriate avenue for relief.

142 Md. App. 327, *, 790 A.2d 83, **,
2002 Md. App. LEXIS 16, ***

Civil Procedure: Venue: Change of Venue Generally
[HN4] See Md. R. 2-327(d).

Civil Procedure: Venue: Change of Venue Generally
[HN5] Transfers under Md. R. 2-327(d) necessarily cause the plaintiff to lose his or her chosen venue, because such transfers may be made only if venue would have been appropriate in both the transferor court and the transferee court. Thus, the rule explicitly authorizes the transferor court to deny the plaintiff his or her choice of venue when it determines that doing so would best serve the interests of justice.

Torts: Public Entity Liability: Claim Presentation
[HN6] The notice provisions of the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), are a principal condition of the state's waiver of its sovereign immunity.

Torts: Public Entity Liability: Claim Presentation
Governments: State & Territorial Governments: Claims By & Against
Governments: State & Territorial Governments: Employees & Officials
[HN7] See Md. Code Ann., State Gov't § 12-106(b) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation
Governments: State & Territorial Governments: Claims By & Against
Governments: State & Territorial Governments: Employees & Officials
[HN8] See Md. Code Ann., State Gov't § 12-108(a) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation
[HN9] In some circumstances, substantial compliance with the notice requirements of the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), may suffice. Substantial compliance is communication that provides the state requisite and timely notice of facts and circumstances giving rise to the claim.

Torts: Public Entity Liability: Claim Presentation
Governments: Legislation: Interpretation
[HN10] Md. Code Ann., State Gov't § 12-102 (1984, 1999, 2001 Cum. Supp.), directs that the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), is to be construed broadly, to ensure that injured parties have a remedy.

Governments: Legislation: Interpretation
[HN11] Courts may not infer an intent where the legislature has clearly indicated the contrary.

Torts: Public Entity Liability: Claim Presentation
Governments: Legislation: Interpretation
[HN12] Provisions such as Md. Code Ann., State Gov't § 12-102 (1984, 1999, 2001 Cum. Supp.), and the canon of construction favoring a liberal interpretation of remedial legislation, are helpful in resolving ambiguities in statutes, but do not permit a court to expand a statute to afford relief where the words of the statute bar that relief. The court may not judicially place in the statute language which is not there in order to avoid a harsh result. Thus, it will not extend or suspend the tort claims filing requirements that are clear and unambiguous.

Torts: Public Entity Liability: Claim Presentation
Governments: State & Territorial Governments: Claims By & Against
Governments: State & Territorial Governments: Employees & Officials
[HN13] The sole purpose of Md. Code Ann., State Gov't § 12-108(a) (1984, 1999, 2001 Cum. Supp.) is to instruct claimants that the one and only method of satisfying the notice requirement is to serve the claim on the state treasurer.

Governments: Legislation: Interpretation
[HN14] The Court of Special Appeals of Maryland will not ignore a statute's clear language.

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Governments: Legislation: Interpretation

[HN15] A statute should be read so that no part of it is rendered nugatory or superfluous.

Governments: Legislation: Interpretation

[HN16] The Court of Special Appeals of Maryland will not expand a statute to afford relief where the words of the statute bar that relief.

Torts: Public Entity Liability: Claim Presentation

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN17] See Md. Code Ann., State Gov't § 12-107(b) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN18] See Md. Code Ann., State Gov't § 12-107(c)(2) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation

Governments: State & Territorial Governments: Claims By & Against

[HN19] Only after the Treasurer of Maryland finally denies a claim against the state may the claimant proceed in court. Md. Code Ann., State Gov't § 12-106(b) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN20] See Md. Code Ann., State Gov't § 12-108(b) (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Claim Presentation

[HN21] Substantial compliance with the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), requires more than a mere lack of prejudice to the State.

Torts: Public Entity Liability: Claim Presentation

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN22] Maryland case law does not treat a plaintiff's failure to give notice to the state treasurer pursuant to the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), as a bar to such a claim against an individual state employee.

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

[HN23] Governmental immunity shields public employees from tort liability arising from discretionary actions performed without malice, but only if those actions were within the scope of the public duties of the state personnel. Md. Code Ann., Cts. & Jud. Proc. § 5-522(b)(4)(ii) (1974, 1998).

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

[HN24] See Md. Code Ann., Cts. & Jud. Proc. § 5-522(b)(4)(ii) (1974, 1998).

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN25] The common law doctrine of privilege under defamation law gives a defensive shield to certain persons who make certain publications in certain circumstances, but only if the publications are made in the performance of their official duties.

Torts: Defamation & Invasion of Privacy: Defamation Actions

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

[HN26] To present a prima facie case for defamation, a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm.

Torts: Defamation & Invasion of Privacy: False Light Privacy

[HN27] The tort of false light invasion of privacy occurs when one gives publicity to a matter concerning another that places the other before the public in a false light if: (a) the false light in which the other was placed would be highly offensive to a reasonable person; and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. It is enough that the actor is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct, or beliefs that are false, and so is placed before the public in a false position.

Torts: Public Entity Liability: Immunity

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN28] Under Maryland common law, public officials performing discretionary duties in furtherance of their public duties may not be held liable if they act without malice. As a result of the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), which limits the state's sovereign immunity on the condition that state employees be afforded a qualified immunity, state employees may be held liable only for any tortious act or omission that is not within the scope of the public duties of the state personnel or is made with malice or gross negligence. Md. Code Ann., Cts. & Jud. Proc. § 5-522(b)(4)(ii) (1974, 1998); Md. Code Ann., State Gov't § 12-105 (1984, 1999, 2001 Cum. Supp.).

Torts: Public Entity Liability: Immunity

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

[HN29] If a complaint alleges facts sufficient to show that a Maryland state official's tortious conduct either was outside the scope of his public duties or was malicious, then it should survive dismissal on the grounds of governmental immunity.

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN30] See Md. Code Ann., Ins. § 2-205(a)(1)(v) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN31] See Md. Code Ann., Ins. § 2-209(a), (b) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN32] See Md. Code Ann., Ins. § 2-209(c)(1) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN33] See Md. Code Ann., Ins. § 2-209(c)(2) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN34] Those who are not examinees, but who are in some way aggrieved by the actions of the commissioner of the Maryland Insurance Administration during an investigation or examination can seek relief, by filing a written demand for a hearing. Md. Code Ann., Ins. § 2-210(a)(2) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN35] See Md. Code Ann., Ins. § 2-209(f) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN36] See Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

[HN37] Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.) imposes a duty of confidentiality with respect to any information, findings, and charges that have not been tested via the administrative procedures established under Md. Code Ann., Ins. § 2-209(c) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN38] See Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.).

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Legislation: Interpretation

[HN39] Courts give significant weight to an agency's interpretation of the statute that it is required to administer.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Claim Presentation

Torts: Public Entity Liability: Immunity

Torts: Vicarious Liability: Respondeat Superior

[HN40] The phrase "scope of the public duties" in the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), is coextensive with the common law concept of scope of employment under the doctrine of respondeat superior.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Vicarious Liability: Respondeat Superior

[HN41] In Maryland, the general test for determining if an employee's tortious acts were within the scope of his employment is whether they were in furtherance of the employer's business and were authorized by the employer. By "authorized" is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders. To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized. An important factor is whether the employee's conduct was expectable or foreseeable.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Vicarious Liability: Respondeat Superior

[HN42] In cases involving intentional torts committed by an employee, Maryland case law emphasizes that where an employee's actions are personal, or where they represent a departure from the purpose of furthering the employer's business, or where the employee is acting to protect his own interests, even if during normal duty hours, the employee's actions are outside the scope of his employment. Where the conduct of the servant is unprovoked, highly unusual, and quite outrageous, this in itself may be sufficient to indicate that the motive was a purely personal one and the conduct outside the scope of employment.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Immunity

Torts: Vicarious Liability: Respondeat Superior

Governments: State & Territorial Governments: Employees & Officials

[HN43] The overall test in determining whether tortious acts were committed in the scope of employment is whether the tortious acts were done by the employee in furtherance of the employer's business and were such as may fairly be said to have been authorized by him. Among the factors to be considered in determining whether a particular tortious act was within the scope of public duties are whether or not the master has reason to expect that such an act will be done, the similarity in quality of the act done to the act authorized, the extent of departure from the normal method of accomplishing an authorized result, and whether or not the act is seriously criminal.

Civil Procedure: Pleading & Practice: Pleadings: Heightened Pleading Requirements

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

[HN44] In Maryland, when the allegations of a complaint raise competing factual inferences, the question of whether or not a public employee's actions were within the scope of his employment should not be decided on a motion to dismiss. To ensure that the benefit of governmental immunity is realized as early as possible in the litigation process, courts place

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

a higher pleading burden on claimants seeking to avoid the bar of governmental immunity. To overcome a motion raising governmental immunity, a plaintiff must allege with clarity and precision those facts that make the act fall outside the scope of the public employment. "Magic words" that are not supported by specific facts do not suffice.

Civil Procedure: Pleading & Practice: Pleadings: Heightened Pleading Requirements

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

[HN45] In Maryland, merely alleging that a public employee's tortious act was unauthorized is not sufficient to defeat a motion raising a governmental immunity defense. An act may be within the scope of employment, even though forbidden or done in a forbidden manner, or consciously criminal or tortious. An employee's unauthorized conduct might fall within the scope of employment if it was of the same general nature as conduct that was authorized or incidental to that conduct. Specifically, it is not enough to allege that a public employee disobeyed directions, because he or she may have done so as a result of the very type of negligence that governmental immunity was designed to cover. Accordingly, a plaintiff contending that the particular conduct about which he complains was unauthorized must allege specific facts raising an inference that the public employee knew that his conduct was unauthorized.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

[HN46] Under Maryland case law, in some circumstances, when a public official acts in knowing violation of a public law that he or she has a duty to obey, an inference may be drawn that the official either has a personal motive or is departing from the employer's business. This inference is drawn where the egregious or personal nature of the misconduct precludes any other inference.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

[HN47] Under Maryland case law, although under some circumstances, an elected official may be acting within the scope of his or her employment when making statements to the press, the official cannot claim to be performing public duties by making false and defamatory statements to the press for his or her own purposes.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

[HN48] An allegation that a public official violated a specific nondisclosure statute constitutes a tenable contention that the publication was not within the scope of his or her public duties.

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Defamation Actions

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN49] The nondisclosure instructions in Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.), are specifically directed to the commissioner of the Maryland Insurance Administration. The provision strictly limits disclosure of such information to an exclusive list of public agencies concerned with insurance regulation and law enforcement. Section 2-209(g)(1)-(2). Even then, it prescribes that disclosures may be made to such agencies only for regulatory, law enforcement, or prosecutorial purposes, and only if the agency receiving the disclosure agrees in writing to keep the disclosure confidential and the commissioner is satisfied that the agency will preserve the confidential nature of the information. Section 2-209(2)(i)-(iii). In these circumstances, if the commissioner elects to make public statements that are prohibited by § 2-209(g), then he or she does so outside the protection of his or her public office, and at the risk that he or she may be held accountable for any tortious statements.

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN50] See Md. Code Ann., Ins. § 2-209(g)(1) (1995, 1997, 2001 Cum. Supp.).

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Insurance Law: Regulation of Insurance: Insurance Company Operations
[HN51] See Md. Code Ann., Ins. § 2-209(2)(i)-(iii) (1995, 1997, 2001 Cum. Supp.).

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment
Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN52] As a matter of law, disclosures in violation of Md. Code Ann., Ins. § 2-209(g) (1995, 1997, 2001 Cum. Supp.), cannot be made in the performance of the public duties of the commissioner of the Maryland Insurance Administration.

Civil Procedure: Appeals: Reviewability: Preservation for Review

[HN53] The Court of Special Appeals of Maryland will not address an issue where the parties and the trial court did not.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

[HN54] State officials who commit torts within the scope of their public duties do not have governmental immunity if they act with malice. Md. Code Ann., Cts. & Jud. Proc. § 5-522(b) (1974, 1998). Malice may be inferred from the surrounding circumstances. The question raised for purposes of immunity under the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-101 et seq. (1984, 1999, 2001 Cum. Supp.), is whether a jury could reasonably find that an official's conduct, given all of the existing and antecedent circumstances, was motivated by ill-will, by an improper motive, or by an affirmative intent to injure. That motive or animus may exist even when the conduct is objectively reasonable. If it does, there is no statutory immunity.

Civil Procedure: Pleading & Practice: Pleadings: Heightened Pleading Requirements

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

[HN55] Whether a complainant has sufficiently alleged malice on the part of public official is a question of law. In making that determination, Maryland courts draw all inferences regarding credibility and factual disputes in favor of the plaintiff. Because the determination of malice, in particular, involves findings as to the defendant's intent and state of mind, there is less likelihood of its presenting an abstract issue of law. Nevertheless, to defeat a motion to dismiss based on governmental immunity, a plaintiff must point to facts sufficient to raise an inference of malice. The plaintiff must allege with some clarity and precision those facts that make the act malicious, must point to specific evidence that raises an inference that the defendant's actions were improperly motivated in order to defeat the motion. That evidence must be sufficient to support a reasonable inference of ill-will or improper motive.

Civil Procedure: Pleading & Practice: Pleadings: Heightened Pleading Requirements

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

[HN56] Bald assertions and conclusory statements regarding an unsavory motive, unsupported by any specific factual detail, are not sufficient to raise an inference of malice, or to withstand a motion to dismiss an action against a Maryland public official on grounds of immunity.

Labor & Employment Law: Employer Liability: Tort Liability: Scope of Employment

Governments: State & Territorial Governments: Claims By & Against

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN57] Even defamatory statements made by a governor or other superior executive officer of a state are absolutely privileged if the defamatory communication is made in the performance of his or her official duties. This absolute privilege extends to the heads of state departments.

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN58] An absolute privilege is one that provides complete immunity and applies principally to: (1) judicial proceedings; (2) legislative proceedings; (3) in some cases, to executive publications; (4) publications consented to; (5) publications between spouses; and (6) publications required by law. The difference between an absolute privilege and a

142 Md. App. 327, *; 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

qualified or conditional privilege is that the former provides immunity regardless of the purpose or motive of the defendant, or the reasonableness of his conduct, while the latter is conditioned upon the absence of malice and is forfeited if it is abused.

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN59] The absolute privilege exists only when the officer publishes the defamatory matter in the performance of his official duties, or within the scope of his line of duty. It is enough that the publication is one that the officer is authorized to make in his capacity as an officer. Thus, the head of a state department may be authorized to issue press releases giving the public information concerning the conduct of the department, or events of public interest that have occurred in connection with it; and if he is so authorized he is within the scope of his official duties when he gives the information to the press. The scope of an official's absolute privilege should not be extended, however, by an unduly broad concept of his official duties.

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN60] A Maryland state official is not entitled to an absolute privilege defense against a claim that he made tortious public statements in violation of a specific statute prohibiting such statements.

Civil Procedure: Appeals: Reviewability

[HN61] Where a novel issue will arise again on remand, and a litigant has raised it on appeal, the Court of Special Appeals of Maryland may address it for the convenience and guidance of both the trial court and the parties. Md. R. 8-131(a).

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Absolute Privileges

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN62] The question of whether a defamatory statement should be absolutely privileged involves a matter of public policy in which the public interest in free disclosure is weighed against the harm to individuals who may be defamed. Maryland case law focuses on an executive official's public duties rather than on the title of his or her public job. The general rule provides for conditional privilege for most executives.

Torts: Public Entity Liability: Immunity

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN63] The burden of justifying absolute immunity rests on the official asserting the claim. An executive official seeking absolute immunity first must show that the responsibilities of his office embrace a function so sensitive as to require a total shield from liability. Next, the official must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.

Insurance Law: Regulation of Insurance: Insurance Company Operations

[HN64] The Maryland Insurance Administration is an independent executive agency, not a principal, or cabinet-level, department. Md. Code Ann., Ins. § 2-101(a)(2) (1995, 1997, 2001 Cum. Supp.).

Insurance Law: Regulation of Insurance: Insurance Company Operations

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN65] The Maryland Insurance Commissioner may assert only a conditional privilege.

Torts: Public Entity Liability: Liability

Governments: State & Territorial Governments: Employees & Officials

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN66] One who upon an occasion giving rising to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given. Because there is no conditional privilege to make tortious statements that are not within the scope of one's public duty, a conditional privilege may be lost by excessive publication to third parties other than those

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

whose hearing is reasonably believed to be necessary or useful to the protection of the interest. Resolution of whether the conditional privilege has been abused is ordinarily a jury question.

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN67] Statements uttered in the course of a trial or contained in pleadings, affidavits, or other documents related to a case fall within an absolute privilege, and therefore cannot serve as the basis for an action in defamation.

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN68] Under Maryland law, statements in a document that was prepared for possible use in litigation, but not actually filed in a judicial or quasi-judicial proceeding, may be within the scope of the judicial privilege, but the scope of judicial privilege is not boundless. It is not extended when doing so does not serve the important public interest for which it was created--the unfettered disclosure of information needed for a judicial or quasi-judicial decision-making process. A judicially privileged disclosure must be made in a forum that has adequate procedural safeguards designed to minimize the occurrence of defamatory statements.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Intentional Torts: Abuse of Process & Malicious Prosecution

[HN69] An abuse of process claim is properly dismissed for failure to allege the essential element of willful misuse of process in a manner not contemplated by law.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

[HN70] When a trial court's decision to dismiss a count is predicated on evidence outside the complaint, the court is actually granting summary judgment. Md. R. 2-322(c).

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN71] The existence of a factual dispute material to determining the liability of the moving party creates a jury question that may not be resolved on the pleadings. Md. R. 2-501(e).

COUNSEL: ARGUED BY Sunanda K. Holmes of Chevy Chase, MD. FOR APPELLANT.

ARGUED BY Randolph S. Sargent, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General and Dorothy Wilson on the brief) all of Baltimore, MD. FOR APPELLEES.

JUDGES: ARGUED BEFORE EYLER (Deborah S.), ADKINS, and BLOOM (Theodore G.), Retired, specially assigned, JJ. Opinion by ADKINS, J.

OPINION: [*339] [**89]

Does serving notice of a tort claim against a State agency on the Attorney General, instead of on the Treasurer, substantially comply with the notice requirements of the Maryland Tort Claims Act? Does a public official act within the scope of his public duties when he makes statements and disclosures to the press in violation of a statute that specifically prohibits such publications? Does the Commissioner of the Maryland Insurance Administration, as the head of an independent State agency, have an absolute privilege to make defamatory public statements about persons under agency investigation? In this appeal, we answer "no" to each of these novel questions.

This is another appellate chapter arising from the misfortunes of PrimeHealth Corporation ("PrimeHealth"), a defunct Maryland health maintenance organization ("HMO"). Christian Chinwuba, M.D., appellant, was the primary owner of PrimeHealth, until the State placed the insolvent HMO into receivership. In this case, Chinwuba complains about certain statements and actions of the Maryland Insurance Administration (the "MIA") [***2] and its commissioner, Steven B. Larsen (the "Commissioner"), appellees, during the investigation leading up to that receivership.

In the Circuit Court for Prince George's County, Chinwuba filed a four count complaint against the MIA and Larsen, alleging defamation, false light invasion of privacy ("false light"), abuse of process, and violation of due process under Articles 24 and 26 of the Maryland Declaration of Rights. The MIA and Larsen successfully moved to transfer the case

to the Circuit Court for Baltimore City, and then moved to dismiss the complaint, or, in the alternative, for summary judgment. That court held that Chinwuba's [**90] claims should properly be dismissed for . . . (1) failure to comply with the Maryland Tort Claims Act, (2) the Commissioner falls within the statutory and common law immunity, (3) the Commissioner falls within absolute privilege and some statements fall within the judicial proceedings privilege and, (4) failure to state a claim for abuse of [*340]process, and (5) [Chinwuba] received due process and failed to allege harm to any cognizable interest.

On appeal, Chinwuba challenges all of these adverse decisions, arguing:

I. The Circuit Court for Prince[***3] George's County erred in transferring the case to Baltimore City.

II. The Circuit Court for Baltimore City erred in dismissing all four counts of his complaint, because

A. he substantially complied with the notice requirements of the Maryland Tort Claims Act ("MTCA"), by serving his complaint on the Attorney General;

B. Larsen did not have governmental immunity to make statutorily prohibited statements and disclosures about the substance of the MIA's charges against PrimeHealth and Chinwuba, during the midst of the MIA's investigation and examination of PrimeHealth;

C. Larsen did not have an absolute privilege, as the head of a State agency, to make statements that damaged Chinwuba's reputation, and he lost any conditional privilege to do so by making statements in violation of the nondisclosure statute he was charged with enforcing;

D. the absolute privilege for statements made in judicial proceedings cannot shield Larsen from liability for his statements to the press;

E. Chinwuba adequately alleged an abuse of process; and

F. there were factual disputes over whether Chinwuba received due process.

Chinwuba's appeal raises three new questions (discussed infra[***4] in parts A, B, and C of section II), regarding the circumstances in which the Commissioner of the MIA may be held liable for making allegedly tortious publications to the press during an MIA investigation.

Although we find no error in the transfer, we agree with Chinwuba that his complaint should not have been dismissed in its entirety. In particular, we conclude that, if Larsen made public statements that defamed Chinwuba or placed him [*341] in a false light, and if he did so in violation of a statute that required him to refrain from making such statements, then Larsen stepped outside any immunity or privilege protections that his public office afforded him. Given the allegations in Chinwuba's complaint and the newspaper articles attached to it, we hold that Chinwuba stated cognizable claims for defamation and false light. We shall affirm the judgments in favor of the MIA and in favor of Larsen on the abuse of process and due process counts, but vacate the judgments entered in Larsen's favor on the defamation and false light counts.

FACTS AND LEGAL PROCEEDINGS

Appellees moved to dismiss Chinwuba's complaint, and, in the alternative, for summary judgment. [HN1] In reviewing[***5] the dismissal of a complaint, we credit the allegations of the complaint, and draw all reasonable inferences in favor of the plaintiff. See *Shah v. HealthPlus, Inc.*, 116 Md. App. 327, 332, 696 A.2d 473, cert. denied, 347 Md. 682, 702 A.2d 291 (1997). Consequently, this opinion features Chinwuba's version of events, even though a [**91] fact-finder ultimately may not accept that version as true. In particular, we are required to assume for purposes of this appeal that the statements about which Chinwuba complains were both false and harmful to his reputation. n1

-----Footnotes-----

n1 In the trial court and in this Court, Larsen argued that he was entitled to summary judgment because the statements and publications in question were true. The trial court did not reach that issue, and consequently, neither will we. See *Davis v. DiPino*, 337 Md. 642, 650, 655 A.2d 401 (1995); *Antigua Condo. Ass'n v. Melba Investors Atlantic, Inc.*, 307 Md. 700, 719, 517 A.2d 75 (1986). Given our disposition of this appeal, however, Larsen may raise that issue on remand.

-----End Footnotes-----

[***6]

PrimeHealth's Certification As A Maryland HMO

Dr. Chinwuba, a radiologist, had an ownership share in PrimeHealth, through ownership of PrimeHealth's sole shareholder, n2 and was the sole owner of Diagnostic Health Imaging [*342] Systems, Inc. ("DHIS"). In November 1995, PrimeHealth applied to the MIA for a certificate of authority to operate as an HMO in Maryland. In support of the application, Chinwuba submitted an affidavit describing a transfer of certain medical equipment by DHIS to PrimeHealth. The purpose of the transfer was to ensure that PrimeHealth had a minimum surplus of \$1.5 million in assets, as required by the MIA's solvency standards for health maintenance organizations. In its initial audit, the MIA raised concerns that PrimeHealth did not meet this requirement. With the "acquisition" of the medical equipment from DHIS, PrimeHealth had sufficient assets to satisfy the standard. In December 1996, however, "DHIS became totally operationally defunct."

-----Footnotes-----

n2 Chinwuba owned 81 percent of Goldmark Friendship, LLC ("Goldmark"), which, in turn, owned 100 percent of PrimeHealth.

-----End Footnotes-----

[***7]

Based on the effect of this transfer on DHIS, the MIA became concerned that DHIS creditors might be able to challenge it as a fraudulent conveyance. On August 28, 1996, the MIA asked Chinwuba to provide a notarized statement disclosing "any and all liabilities or debts of DHIS, and any and all liens or encumbrances on the assets of DHIS immediately preceding the gift of assets to PrimeHealth." Chinwuba was asked to attest that neither he nor DHIS was aware of any creditors "that could have the gift of DHIS' accounts receivable and equipment set aside or annulled to satisfy their claim or levy" or "that would force DHIS to file for bankruptcy in the foreseeable future."

Chinwuba responded to the MIA's request on September 6, 1996. He provided a notarized certification disclosing debts secured by the equipment and DHIS's general debts and liabilities, including accounts payable, taxes, and deferred revenue. That same day, an MIA examiner contacted Chinwuba by facsimile letter to request that he specifically attest that "DHIS does not have any other liabilities or debts or any liens or encumbrances on the assets of DHIS immediately preceding the gift of assets to PrimeHealth with exception[***8] [of] those stated in this confirmation."

Immediately upon receipt of this request, Chinwuba revised his certification to include verbatim the language requested by [*343] the MIA examiner. He submitted this revised and notarized certification to the MIA on the same day.

Later that day, Chinwuba became concerned about whether the revised certification was completely accurate. In an effort to correct the revised certification, he created a third certification. This unnotarized certification differed from the second [***92] certification by a single word. Chinwuba added the word "contributed" to his previous statement that "DHIS does not have any other liabilities or debts or any liens or encumbrances on the assets of DHIS" The third certification qualified that assertion by stating that "DHIS does not have any other liabilities or debts or any liens or

encumbrances on the 'contributed' assets of DHIS[.] In November 1996, relying on Chinwuba's statements in all three certifications, the MIA granted PrimeHealth a certificate of authority to operate as an HMO.

Concerns About Chinwuba's Representations To The MIA

By early 1998, the MIA claimed that it had discovered millions[***9] of dollars in judgments against DHIS, that these judgments had been in existence when DHIS transferred the medical equipment to PrimeHealth, and that none of these judgments had been disclosed in any of Chinwuba's certifications. In a March 11, 1998 letter, Commissioner Larsen informed PrimeHealth that the MIA had "grave concerns covering a number of critical areas relating to PrimeHealth's ongoing ability to maintain licensure," and outlined those concerns. The opening paragraph of the letter acknowledged that the MIA already had begun a "review" of the gift of medical equipment that Chinwuba certified had been made by DHIS to PrimeHealth.

As you know, the [MIA] has been conducting a review of PrimeHealth's status as a licensee in light of recent disclosures that have come to light relating to the company's ownership and to the status of certain assets that were gifted to PrimeHealth in order to satisfy statutory solvency requirements. Frankly, facts gleaned from our review, and in particular your responses to recent inquiries by this [*344] agency, have served to raise more questions than have been answered. . . . If written responses are not provided as set forth on page 8 of this[***10] letter which fully and adequately address the concerns set forth, the [MIA] will have no choice but to pursue appropriate action authorized under the laws of this State.

Among the cited concerns were DHIS liabilities at the time of the "gift," Chinwuba's failure to disclose such liabilities in his certifications to the MIA, and allegedly conflicting statements regarding the ownership and management of PrimeHealth.

With respect to the DHIS liabilities, Larsen wrote that "recently, during the course of our investigation, the [MIA] has uncovered a substantial number of judgments against DHIS which existed at the time of the conveyance of the equipment to PrimeHealth and which have not been extinguished in the court records of Prince George's County." Larsen specifically stated that "the veracity of [Chinwuba's] critical notarized statement [regarding the existence of creditors that could challenge the DHIS transfer of the medical equipment to PrimeHealth] is . . . in doubt." Asserting that he "intended to continue [his] inquiry into this matter," Larsen demanded "a full explanation as to why Dr. Chinwuba certified that no additional judgments existed when the court records [***11] clearly indicate otherwise; . . . and why the [MIA] should not have concerns relating to the management based on the criteria listed above."

PrimeHealth responded through its attorneys, by letter dated March 27, 1998. The letter was accompanied by affidavits and attachments that purported to address "the three areas of concern, ownership/control, the transfer of assets to PrimeHealth, and the fitness of management, which were raised in [Larsen's] letter of March 11." PrimeHealth interpreted the [**93] MIA's concerns regarding its management team as related to "your interpretation of Dr. Chinwuba's notarized statement of September 6, 1996." In the letter and a supporting affidavit, PrimeHealth took the position that "Dr. Chinwuba was correct in his assertion that the subject equipment was [*345] unencumbered at the time it was transferred to PrimeHealth, except as otherwise disclosed to the [MIA]."

Larsen replied to PrimeHealth's explanation letter, by letter dated March 31, 1998, which set forth "new and continued concerns." The MIA issued a draft "Limited Scope Examination Report" (the "proposed report"), detailing various deficiencies in PrimeHealth's operations. n3 Among the matters[***12] addressed in the proposed report were Chinwuba's certifications regarding the transfer of medical equipment. The proposed report stated that those certifications were false and misleading, in that they failed to disclose the DHIS liabilities.

-----Footnotes-----

n3 The trial court stated that an initial draft of the proposed report was issued on March 31, 1998. The MIA advised the Prince George's court that the proposed report "was issued on March 28th, 1998."

-----End Footnotes-----

Larsen's Statements And Disclosures To The Press

Chinwuba alleged in his complaint that "sometime in February and March 1998, Larsen . . . released his March 11th letter, PrimeHealth's March 27th letter and other documents to the media and the public. . . and made verbal statements regarding his investigation of PrimeHealth and Chinwuba to the media and the public." These disclosures resulted in "numerous articles published in the Baltimore Sun and Washington Post," copies of which Chinwuba attached as exhibits to his complaint.

These articles initially[***13] related to a controversy involving a former Maryland state senator, who was then under investigation for exchanging political favors for improper payments, including payments from PrimeHealth. Later, the focus of the articles became PrimeHealth itself, and included references to Chinwuba and Larsen's contentions that Chinwuba had used deception to obtain MIA certification. They outlined the MIA's investigation, charges, and viewpoint, and named Larsen as a source of information. Stories attributed to information that Larsen allegedly provided during this period included the following articles:

[*346] . Charles Babington & Avram Goldstein, Top Official Questions Md. HMO's License, Wash. Post, Mar. 13, 1998, at B1.

Maryland's top insurance regulator has expressed "grave concerns" about whether . . . PrimeHealth Corp., can keep its license to serve Medicaid patients because of unanswered questions about who owns the firm and how it obtained many of its assets. . . .

In a sternly worded letter delivered Wednesday to PrimeHealth's president, . . . Larsen said PrimeHealth has until March 20 to answer questions about who owns the company and whether it has clear title to its assets. [***14] Otherwise, the commissioner will take "appropriate action," the letter said. . . . Larsen demanded sworn testimony explaining what he called contradictory documents, and he threatened to invoke perjury laws if, for example, PrimeHealth fails to reveal who its true owners are. . . .

Questions about PrimeHealth center on its relationship with DHIS On Sept. 6, 1996, Chinwuba wrote that he knew of no indebtedness "that could set aside, annul or challenge" his gift to [**94] PrimeHealth, Larsen's letter said. In light of the numerous liens existing then and now, Larsen's letter said, "the veracity of this critical notarized statement is therefore in doubt."

. Walter F. Roche, Jr. & Scott Higham, Officials reviewing PrimeHealth documents, Balt. Sun, Apr. 1, 1998 (online version).

Maryland insurance officials said yesterday they will spend the weekend reviewing documents delivered by PrimeHealth Corp. to determine whether the Lanham-based company should continue to operate in Maryland as a health maintenance organization.

In the midst of two grand jury investigations of [a] former [state senator] and his ties to health companies such as PrimeHealth, the Maryland[***15] Insurance Administration ordered a sweeping review of the company last month. . . .

[*347] Insurance Commissioner Steven B. Larsen extended a deadline until yesterday for PrimeHealth to answer questions about the ownership of the company and its financial stability. Larsen said the company delivered documents late yesterday, and agency officials will review them before making any decision. . . . Larsen said in his letter that the company failed to disclose judgments against the firm totaling about \$3 million.

Charles Babbington, Insurance Chief Urges Md. To Curb Payments to HMO, Wash. Post, Apr. 2, 1998, at D7.

Maryland's insurance commissioner said yesterday that state payments to Lanham-based PrimeHealth Corp. should be suspended or placed under state control because the managed care company has not provided adequate answers to questions about its debts and ownership.

Commissioner Steven B. Larsen asked the state health department to withhold further Medicaid reimbursements to PrimeHealth or to place them in "a supervised bank account" that essentially would give the state control over how the company uses its money. In a letter to PrimeHealth, Larsen said he continues to [***16]worry "about possible fraudulent conveyances" of valuable medical equipment that was crucial to PrimeHealth's start-up in 1996.

The letter was the latest blow to the Prince George's County health maintenance organization At Larsen's request last month, the health department delayed payment of nearly \$2.5 million to PrimeHealth, and an official said that money would continue to be held for the time being. . . . PrimeHealth officials would not answer questions yesterday about Larsen's latest letter. . . . Larsen has questioned the truthfulness of affidavits filed by the company. PrimeHealth last week acknowledged that its primary owner is radiologist Christian E. Chinwuba, who was not identified as owner in those affidavits. Another Chinwuba company, Diagnostic Health Imaging Services, was more than \$6 million in debt when he shifted its most valuable medical equipment to PrimeHealth.

[*348] Larsen has said Diagnostic Health's creditors might make legal claims against PrimeHealth's assets to settle debts.

In his letter yesterday, Larsen said PrimeHealth has been "completely inconsistent" in its explanations of Diagnostic's debts and their possible effect on PrimeHealth. [***17] . . . Larsen wrote: "I am concerned that PrimeHealth may be using Medicaid funds to pay the debts of an unrelated, unlicensed corporation."

[**95]

PrimeHealth's Receivership And

Finalization Of The MIA's Proposed Report

On August 23, 1998, the Commissioner initiated receivership proceedings against PrimeHealth in the Circuit Court for Baltimore City. Among the cited reasons were that PrimeHealth's management had provided inconsistent, false, and misleading information to the MIA in order to obtain licensing and during the investigation. In September 1998, PrimeHealth filed exceptions to the proposed report, and requested a hearing on the proposed report and exceptions. As a result of negotiations with the State, on October 1, 1998, PrimeHealth agreed to the receivership in a consent order. As receiver under the consent order, the Commissioner withdrew PrimeHealth's hearing request. n4

-----Footnotes-----

n4 This Court upheld this withdrawal. See PrimeHealth Corp. v. Ins. Comm'r, 133 Md. App. 375, 758 A.2d 539 (2000).

-----End Footnotes-----

[***18]

On November 25, 1998, Chinwuba's counsel filed exceptions to, and requested a hearing on, the proposed report, purportedly on behalf of unidentified "owners, officers and directors of PrimeHealth[.]" Citing the consent order and the receivership, an MIA hearing officer ruled that PrimeHealth's owners, officers and directors lacked standing to challenge the proposed report. Nevertheless, Chinwuba was allowed to submit information in support of his exceptions to the proposed report. He did so on December 31, 1998. Responding to Chinwuba's exceptions point-by-point, the MIA filed an addendum to the proposed report.

[*349] On March 3, 1999, the Commissioner petitioned the circuit court to approve the proposed report, as amended. On March 4, the court did so. On March 8, 1999, the Commissioner finally adopted the report, which included the MIA's addendum, PrimeHealth's exceptions, depositions of Chinwuba and others, and all of the material submitted by Chinwuba.

On March 12, 1999, Chinwuba and Goldmark Friendship, LLC ("Goldmark"), filed a motion to reconsider the March 4 order authorizing the Commissioner to finalize the report. On April 7, 1999, Chinwuba filed on his own behalf a petition[***19] for judicial review of the order finalizing the report. On April 12, Chinwuba's attorney also filed separate petitions for judicial review on behalf of Goldmark and PrimeHealth.

On May 10, the Baltimore City Circuit Court dismissed the petition filed on behalf of PrimeHealth, because it constituted a collateral attack on the consent order. Chinwuba, purportedly on behalf of PrimeHealth, appealed that dismissal to this Court.

This Action And Other Related Suits

On June 21, 1999, Chinwuba filed this suit, in the Circuit Court for Prince George's County. Chinwuba alleged, inter alia, that "sometime in February and March 1998," Larsen released his March 11 letter, PrimeHealth's March 27 reply letter, "and other documents to the media and the public." He complained that Larsen's disclosures were both defamatory and in violation of the Maryland Insurance Code. He alleged that "Larsen's unlawful defamatory statements were the subjects of numerous articles published in the Baltimore Sun and Washington Post from February or March 1998." He attached to his complaint a number of articles, including those excerpted above, and other later-published ones. [**96]

In August[***20] 1999, Goldmark filed another action in the Baltimore City Circuit Court, seeking to prevent the sale of PrimeHealth in the receivership proceedings. It argued that PrimeHealth's president had not been authorized to consent to the receivership and that PrimeHealth was not insolvent. [*350] With two petitions for judicial review filed by Chinwuba and Goldmark still pending in Baltimore City Circuit Court, and Goldmark's separate action to stop the sale of PrimeHealth also pending in the Baltimore City court, the MIA and the Commissioner moved to either dismiss or transfer Chinwuba's Prince George's County complaint. After consulting with the administrative judge in Baltimore, the administrative judge for the Prince George's County Circuit Court ordered this action transferred to Baltimore City.

After the transfer, the MIA and Larsen renewed their motion to dismiss, or, in the alternative, for summary judgment. The trial court granted the motion. In a written opinion and order, the court held that Chinwuba's failure to serve the Treasurer barred all of his claims. As alternative reasons for dismissing the claims, the court also concluded that the claims were barred by governmental immunity,[***21] because "nothing in the Complaint properly alleges any conduct outside of the scope of the Commissioner's public duties," and Chinwuba failed to allege with specificity any facts from which an inference of malice could be drawn. With respect to the individual counts, the court dismissed the defamation and false light counts because the statements Chinwuba complained about were either protected by absolute privilege for judicial proceedings, or protected by absolute privilege for the head of a state agency acting in the course of his official duties. He dismissed the abuse of process count because the complaint did not allege any misuse of process or any legally cognizable damage. He granted summary judgment on the due process count because, inter alia, Chinwuba did not request the hearing he claims he should have gotten. This appeal followed.

DISCUSSION

I.

The Trial Court Did Not Err In Transferring The Case

We first address Chinwuba's contention that the trial court erred in granting appellees' motion to transfer this case from [*351] Prince George's County, where Chinwuba lives, to Baltimore City, where other cases involving the same parties were pending. [***22] Chinwuba argues that the transfer improperly deprived him of his choice of venue and his right to a jury trial. We disagree.

Under Md. Rule 2-327(d),

[HN2] if civil actions involving one or more common questions of law or fact are pending in more than one judicial circuit, the actions . . . may be transferred . . . for consolidated pretrial proceedings or trial to a circuit court in which . . . the actions to be transferred might have been brought, and . . . similar actions are pending. . . . A transfer under this

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

section shall not be made except upon . . . a finding by the circuit administrative judge having administrative authority over the transferor court that . . . the transfer will promote the just and efficient conduct of the actions to be consolidated and not unduly inconvenience the parties and witnesses in the actions subject to the proposed transfer; and . . . acceptance of the transfer by the circuit administrative judge . . . [of] the court to which the actions . . . will be transferred.

" [HN3] Where a litigant is faced with a real multiplicity of suits involving the same issues, Rule 2-327(d) furnishes the appropriate [**97] avenue for relief." State v. 91st St. Joint Venture, 330 Md. 620, 630-31, 625 A.2d 953 (1993).[***23]

At the time of this transfer, several other actions involving these same parties and issues had been submitted to a single judge in the Baltimore City Circuit Court. By September 1999, Chinwuba repeatedly had sought judicial review of actions taken by appellees in connection with PrimeHealth. He asked the Baltimore court to reconsider its decision to finalize the proposed report. In addition, Chinwuba, PrimeHealth, and Goldmark filed separate petitions for judicial review of the final report.

These Baltimore suits involved the same parties and raised the same or related questions concerning an interwoven set of operative facts, i.e., the actions of the MIA and Larsen [*352] with respect to PrimeHealth. Because the MIA and Larsen cited Chinwuba's actions during the certification process as grounds for their prior actions, all of these suits involved the same critical issue that Chinwuba raised in this action - whether Chinwuba made false or deceptive statements to obtain and maintain certification to operate PrimeHealth as a Maryland HMO. To resolve Chinwuba's claims in this action, the Prince George's court would have had to acquaint itself with a voluminous record that the Baltimore[***24] court already had been required to master. In these circumstances, the Prince George's court appropriately exercised its discretion to transfer Chinwuba's newest claims to a court that was actively engaged in resolving claims involving related factual and legal questions. In this respect, the transfer " [HN4] promoted the just and efficient conduct of the actions" and did "not unduly inconvenience the parties and witnesses in" this action. See Md. Rule 2-327(d).

We find no merit in either of Chinwuba's grievances about the transfer. His complaint that he was denied his preferred venue, while true, has no persuasive value. [HN5] Transfers under this rule necessarily cause the plaintiff to lose his or her chosen venue, because such transfers may be made only if venue would have been appropriate in both the transferor court and the transferee court. See *Urquhart v. Simmons*, 339 Md. 1, 19, 660 A.2d 412 (1995). Thus, the rule explicitly authorizes the transferor court to deny the plaintiff his or her choice of venue when it determines that doing so would best serve the interests of justice. See *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 41, 575 A.2d 1235 (1990).[***25]

Chinwuba's contention that he would be denied his right to a jury trial is also groundless. Chinwuba does not point to any ruling indicating that the Baltimore court could not or would not give him a jury trial on these claims. If he presented a jury question on any of the issues raised by his complaint, Chinwuba would be entitled to litigate those matters to a Baltimore City jury. The transfer in no way deprived him of a jury trial. He is simply wrong to conclude otherwise.

[*353] We turn now to the Baltimore court's reasons for dismissing all of Chinwuba's claims against both the MIA and Larsen.

II.

The Trial Court Properly Dismissed Chinwuba's Claims Against The MIA, But Erred In Dismissing All Of His Claims Against Larsen

Chinwuba argues that the trial court erred in dismissing all of his claims against both the MIA and Larsen. In support, he points to a number of separate errors that cumulatively resulted in the improper dismissal of viable claims. We shall address each of these contentions seriatim.

[**98]

A.

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Chinwuba's Failure To Submit His Claims To The

State Treasurer Barred All Of His Claims Against The MIA

The first novel question raised[***26] in this appeal is whether notice of a claim given to the Attorney General, rather than to the Treasurer, constitutes substantial compliance with the Maryland Tort Claims Act ("MTCA"). See Md. Code (1984, 1999 Repl. Vol., 2001 Cum. Supp.), § 12-101 et seq. of the State Government Article ("SG"). Chinwuba argues that the definition of substantial compliance is broad enough to encompass notice to the Attorney General in lieu of the State Treasurer. We disagree.

We have described [HN6] the notice provisions of the MTCA as a "principal condition" of the State's waiver of its sovereign immunity. See *Gardner v. State*, 77 Md. App. 237, 246, 549 A.2d 1171 (1988). To initiate an action under the MTCA, the claimant must "[HN7] submit[] a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim." SG § 12-106(b). "[HN8] Service of the complaint and accompanying documents is sufficient only if made on the Treasurer." SG § 12-108(a). The notice requirement, in effect, creates an administrative [*354] condition precedent that claimants[***27] must satisfy before they may sue in court. See *Simpson v. Moore*, 323 Md. 215, 223, 225, 592 A.2d 1090 (1991). For this reason, courts have no jurisdiction to entertain claims by claimants who fail to exhaust their administrative remedies before the Treasurer. See id.

Chinwuba admits that he did not serve his claim on the Treasurer within the one year limitations period. Instead, he attempts to fit himself within the parameters of cases suggesting that substantial compliance with the MTCA notice requirements can satisfy sections 12-106 and 12-108 of the MTCA.

In *Simpson v. Moore*, the Court of Appeals discussed its decisions concerning an analogous service requirement governing notice of tort claims against counties and municipalities. The *Simpson* Court noted that it had "held that substantial compliance with the notice statute will suffice . . ." Id. at 224.

In *Conaway v. State*, 90 Md. App. 234, 600 A.2d 1133 (1992), we relied on the *Simpson* Court's language to hold that [HN9] in some circumstances, substantial compliance with the notice requirements of the MTCA may suffice. We noted that our holding "is also consistent[***28] with [HN10] § 12-102, which directs that the MTCA is to be 'construed broadly, to ensure that injured parties have a remedy.'" 90 Md. App. at 242 n.3. Applying this standard, we held that a claimant had satisfied the notice requirements of the MTCA even though the claim he submitted to the Treasurer failed to demand a specific amount of damages, as required by section 12-107(a). See 90 Md. App. at 250.

Since then, the Court of Appeals has acknowledged the viability of a "substantial compliance" argument under the MTCA. In *Condon v. State*, 332 Md. 481, 632 A.2d 753 (1993), the Court approved our definition of substantial compliance as "communication that provides the State 'requisite and timely notice of facts and circumstances giving rise to the claim.'" 332 Md. at 497 (quoting *Conaway*, 90 Md. App. at 246).

[*355] The doctrine of substantial compliance, however, is not license to ignore the clear mandate of the MTCA. In *Condon*, the Court of Appeals warned that [HN11] courts may not "infer an intent where the legislature has clearly indicated the contrary." Id. [***99] Similarly, in *Simpson*, the Court declined to use section 12-202 "as[***29] a springboard for judicial legislation" in cases where there is no ambiguity in the statute. *Simpson*, 323 Md. at 227. It explained that "[HN12] provisions such as this, and the canon of construction favoring a liberal interpretation of remedial legislation, are helpful in resolving ambiguities in statutes, but do not permit us to expand the statute to afford relief where the words of the statute bar that relief." Id. We may not "'judicially place in the statute language which is not there' in order to avoid a harsh result." 323 Md. at 225 (citation omitted). Thus, "we will not extend or suspend the filing requirements when they are so clear and unambiguous." *Rivera v. Prince George's County Health Dep't*, 102 Md. App. 456, 469-70, 649 A.2d 1212 (1994), cert. denied, 338 Md. 117, 656 A.2d 772 (1995).

We find no ambiguity in subsections 12-106(b) and 12-108(a), either when they are considered alone or in *pari materia*. Both subsections unambiguously state that notice of any MTCA claim must be directed and delivered to the Treasurer. In fact, [HN13] the sole purpose of subsection 12-108(a) is to instruct claimants that the one[***30] and only method of satisfying this notice requirement is to serve the claim on the Treasurer. If we were to accept Chinwuba's contention that

notice to the Attorney General constitutes substantial compliance with subsections 12-106(b) and 12-108(a), we would be judicially legislating subsection 12-208(a) out of the MTCA. [HN14] We will not ignore its clear language. "[HN15] A] statute should be read so that no part of it is rendered nugatory or superfluous." Condon, 332 Md. at 491. [HN16] Neither will we "expand the statute to afford relief where the words of the statute bar that relief." Simpson, 323 Md. at 227.

Our decision not to treat service on the Attorney General as the equivalent of service on the Treasurer reflects practical [*356] and policy considerations. The effect of holding that service on the Attorney General constitutes substantial compliance with the notice requirements of the MTCA would be to allow claimants, at their option, to cut the Treasurer out of the statutory equation crafted by the legislature, by electing to serve notice of MTCA claims on the Attorney General rather than the Treasurer. n5 There are cogent reasons not to give claimants this[***31] choice. See Condon, 332 Md. at 491-94.

-----Footnotes-----

n5 We note that although section 12-106 specifies that notice must be given to the "Treasurer or a designee of the Treasurer," there is nothing in the record to suggest that the Treasurer has designated that claims should be directed to the Attorney General.

-----End Footnotes-----

Notice to the Treasurer serves important public purposes. Once notified of a timely tort claim against a State agency, the Treasurer considers the fiscal consequences of the claim, and then decides which of several options to pursue. "[HN17] The Treasurer may . . . (1) consider a claim for money damages under this subtitle or delegate wholly or partly this responsibility to other State personnel; and (2) contract for any support services that are needed to carry out this responsibility properly." SG § 12-107(b). As a result of the early notice required under the MTCA, the Treasurer also has "the opportunity to investigate the claims while the facts are fresh and memories[***32] vivid, and, where appropriate, settle them at the earliest possible time." Haupt v. State, 340 Md. 462, 470, 667 A.2d 179 (1995). "[HN18] Unless a contract with a private insurer provides otherwise, the Treasurer or designee may compromise and settle a claim for money damages after the Treasurer or designee [*100] consults with the Attorney General." SG § 12-107(c)(2).

[HN19] Only after the Treasurer finally denies the claim may the claimant proceed in court. See SG § 12-106(b). In that event, "[HN20] unless full representation is provided under a contract of insurance, the Attorney General shall defend an action under this subtitle against the State or any of its units." SG § 12-108(b). "[This] procedure allows the State an opportunity to investigate and either settle the claim, or deny the claim [*357] and thereby choose to later defend against the substantive merits of the suit in a traditional judicial forum." Leppo v. State Highway Admin., 330 Md. 416, 428, 624 A.2d 539 (1993).

We reject Chinwuba's suggestion that he "substantially complied" with subsections[***33] 12-106(b) and 12-108(a) because the State suffered no prejudice from his notice to the Attorney General rather than the Treasurer. This argument wholly ignores the central role that the legislature gave the Treasurer when it decided to conditionally waive the State's sovereign immunity. Moreover, the Court of Appeals specifically has held that "[HN21] substantial compliance [with the MTCA] requires more than a mere lack of prejudice to the State." Johnson v. Maryland State Police, 331 Md. 285, 292, 628 A.2d 162 (1993).

In any event, it is simply incorrect to say that there is "no prejudice" to the State in these circumstances. Chinwuba speculates that the first and only thing the State Treasurer did upon receiving notice of his claim against the MIA was to call in the Attorney General to handle it. Any assumption that the Treasurer's "review" of his claim would be nothing more than merely assigning legal work to the Attorney General is wrong. As sections 12-106 and 12-107 make clear, it is the Treasurer who, in reviewing a claim, considers the impact of tort liability on the State and its budget. Among other matters, the Treasurer determines whether the State is covered[***34] by an insurance program, whether to settle or defend the claim, and whether the claim should be paid from the State Insurance Trust Fund. See SG §§ 12-104, 12-107.

In contrast, the legislature assigned the Attorney General a more subordinate role - to advise the Treasurer regarding settlements, and to defend against claims not covered by an insurance contract. See SG §§ 12-107(c)(2), 12-108(b).

We decline to stretch the substantial compliance doctrine so far that the legislature's unambiguous requirement of notice to the Treasurer becomes meaningless. We hold that the trial court did not err in holding that Chinwuba failed to state a claim against the MIA.

Our holding, however, does not extend to Chinwuba's claims against Commissioner Larsen. It appears that the [*358] trial court erroneously dismissed these claims for lack of notice to the Treasurer. We acknowledge that there is a surprising lack of language in our case law directly addressing whether a claimant may assert a tort claim against an individual State employee without notifying[***35] the Treasurer in accordance with sections 12-106 and 12-108. n6 What is clear from the case law, however, is that [HN22] the Court of Appeals has not treated a plaintiff's failure to give notice to the Treasurer as a bar to such a claim against an individual State employee. In *Sawyer v. Humphries*, 322 Md. 247, 587 A.2d 467 (1991), the Court held that plaintiffs [**101] who had not named the State as a defendant and had not given the Treasurer notice of their claims against the individual State police officer who allegedly assaulted them, could pursue their tort claims against the officer. See *id.* at 252, 262.

-----Footnotes-----

n6 We note that Larsen's brief on this issue merely asserts that Chinwuba's failure to comply with sections 12-106 and 12-108 barred the claims "against the Administration." We read this as an implicit concession that the trial court's dismissal of the claims against Larsen on lack of notice grounds was error.

-----End Footnotes-----

Accordingly, we must review the trial court's other reasons for dismissing [***36]all of Chinwuba's claims against Larsen. As alternate grounds for its judgment, the court held that Larsen had both (1) qualified governmental immunity from tort liability, and (2) an absolute privilege to make all of the allegedly tortious statements about which Chinwuba complained. Chinwuba contests both holdings. In doing so, he raises a second novel issue, concerning whether, by publicly making tortious statements in violation of a specific nondisclosure statute prohibiting such statements, a public official acts outside the scope of his or her public duties, or acts with malice. The answer to this question affects our review of both the governmental immunity and privilege holdings of the trial court. We shall address governmental immunity issues in part II.B and absolute privilege issues in part II.C.

Preliminarily, however, we note that throughout his brief to this Court, Chinwuba mixed the apples of qualified [*359] governmental immunity, which bars a wide variety of common law tort claims against state employees, with the oranges of privilege under defamation law, which is a defense only to a reputational tort claim such as defamation n7 or false light invasion of privacy. n8[***37] This confusion is understandable in the context of this case, because both doctrines share an element central to the resolution of this appeal. [HN23] Governmental immunity shields public employees from tort liability arising from discretionary actions performed without malice, but only if those actions were " [HN24] within the scope of the public duties of the State personnel." Md. Code (1974, 1998 Repl. Vol.), § 5-522(a)(4)(ii) of the Courts and Judicial Proceedings Article ("CJ"). n9 [HN25] The common law [**102]doctrine of privilege under defamation law also gives a defensive shield to certain persons who make certain publications in certain circumstances, but, once again, only if the publications were "made in the performance of [their] official duties." See Restatement (Second) of Torts ("Restatement") § 591.

-----Footnotes-----

n7 " [HN26] To present a prima facie case for defamation, 'a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm.'" *Gohari v. Darvish*, 363 Md. 42, 54, 767 A.2d 321 (2001)(citation omitted).

[***38]

n8 [HN27] The tort of false light invasion of privacy occurs when one . . . gives publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts ("Restatement") § 652E; see *Furman v. Sheppard*, 130 Md. App. 67, 77, 744 A.2d 583 (2000). "It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is defamatory, the rule here stated affords a different remedy, not available in an action for defamation." Restatement § 652E at cmt. b.

n9 [HN28] Under Maryland common law, public officials performing discretionary duties in furtherance of their public duties may not be held liable if they act without malice. See *Thomas v. City of Annapolis*, 113 Md. App. 440, 452, 688 A.2d 448 (1997); *Town of Port Deposit v. Petetit*, 113 Md. App. 401, 412, 688 A.2d 54 (1997). As a result of the MTCA, which limits the State's sovereign immunity on the condition that State employees be afforded a qualified immunity, state employees may be held liable only for "any tortious act or omission . . . that . . . is not within the scope of the public duties of the State personnel; or . . . is made with malice or gross negligence." See Md. Code (1974, 1998 Repl. Vol., 2001 Cum. Supp.), § 5-522(b)(4)(ii) of the Courts and Judicial Proceedings Article ("CJ"); SG § 12-105 ("State personnel shall have the immunity from liability described under § 5-522(b)"); *Simpson*, 323 Md. at 231. Because Larsen's duties as Insurance Commissioner make him both a State employee and a public official, we shall refer to his immunity as "governmental immunity."

-----End Footnotes-----
[***39] [*360]

This appeal involves a public official who had both qualified governmental immunity and some privilege to make certain defamatory statements. Chinwuba argues that the trial court erred in holding that Larsen made all of the allegedly improper statements "within the scope of his public duties" and "in the performance of his official duties." We agree with the trial court that the doctrines of governmental immunity and privilege barred claims based on certain of Larsen's "on-the-job" statements. But, for the reasons set forth in section II.B.4 below, we agree with Chinwuba that the trial court erred in concluding that Larsen had governmental immunity and an absolute privilege to make public statements and disclosures that he was statutorily prohibited from making.

B.

The Trial Court Erred In Dismissing The

Defamation And False Light Claims Against Larsen

On Governmental Immunity Grounds

[HN29] If a complaint alleges facts sufficient to show that a state official's tortious conduct "either was outside the scope of his 'public duties' or was malicious," then it should survive dismissal on the grounds of governmental immunity. See *Sawyer*, 322 Md. at 253.[***40] In its memorandum opinion, the trial court concluded that Chinwuba's "claims should properly be dismissed" because the allegations in his complaint [*361] all relate to the [MIA's] investigation of PrimeHealth and to the Commissioner's petition to place PrimeHealth into receivership, pursuant to the Commissioner's statutory authority. Therefore, these acts were done within the scope of his public duties. . . . Under [Md. Ins. Art. (IN)] section 2-209, . . . the "Commissioner shall make a complete report of each examination made under § 2-205." . . . The Commissioner adopted the Report as final on March 8, 1999. As [prescribed] in [Md. Ins. Art. (IN)] section 2-209(f) "if the Commissioner considers it to be in the public interest, the Commissioner may publish an examination report or a

summary of it in a newspaper in the State." Therefore, based on the Commissioner's concerns of PrimeHealth as previously stated, the Commissioner instituted the investigation in good faith and the publication of the report from such investigation is authorized under the Insurance Article. (Emphasis added and citation omitted.)

The court held that Larsen "[fell] within statutory and common law [governmental] immunity[***41]"

Chinwuba argues that Larsen acted outside the scope of his public duties by making statements and disclosures to the press in violation of Insurance Code prohibitions against publicly disclosing preliminary charges arising from the MIA's investigation and examination, before PrimeHealth and Chinwuba had an opportunity to challenge the MIA's findings and to obtain corrections. This argument requires us to [**103] examine the nature and scope of the Insurance Commissioner's duties, and then to determine whether Chinwuba adequately alleged that Larsen made public statements or disclosures outside the scope of those duties.

1.

The Insurance Commissioner Has A Statutory Duty

Not To Disclose Information Relating To An Investigation And

Examination Until The MIA's Report Becomes Final

One of Larsen's duties as Insurance Commissioner is to " [HN30] examine the affairs, transactions, accounts, records, and assets [*362] of each . . . authorized health maintenance organization." Md. Code (1995, 1997 Repl. Vol., 2001 Cum. Supp.), § 2-205(a)(1)(v) of the Insurance Article ("Ins."). He must " [HN31] make a complete report of each examination," and include[***42] in that report "only facts . . . [discovered] from the books, records, or documents of the person being examined; or . . . determined from statements of individuals about the person's affairs." Ins. § 2-209)(a),--(b).

Before filing a proposed report regarding an examination, however, the Commissioner must " [HN32] give a copy of the proposed report to the person that was examined." Ins. § 2-209(c)(1). If the examinee requests a hearing, the Commissioner " [HN33] may not file a proposed report until after . . . the hearing is held[,] and . . . any modifications of the report that the Commissioner considers proper are made." Ins. § 2-209(c)(2). [HN34] Those who are not "examinees," but who are in some way aggrieved by the Commissioner's actions during an investigation or examination also can seek relief, by filing a written demand for a hearing. See Ins. § 2-210(a)(2). After the report is finalized, " [HN35] if the Commissioner considers it to be in the public interest, the Commissioner may publish an examination report or a summary of it in a newspaper in the State." Ins. § 2-209(f).[***43]

During the period before the report becomes final, however, there are explicit statutory limits on the type of information that the Commissioner may publicize. Sub section 2-209(g) of the Insurance Article states:

[HN36] (g) Disclosure to regulatory or law enforcement agency . . . - (1) Subject to paragraph (2) of this subsection, the Commissioner may disclose the preliminary examination report, investigation report, or any other matter related to an examination made under § 2-205 . . . only to the insurance regulatory agency of another state or to a federal, State, local, or other law enforcement agency.

(2) A disclosure may be made under paragraph (1) of this subsection only if:

(i) the disclosure is made for regulatory, law enforcement, or prosecutorial purposes;

[*363] (ii) the agency receiving the disclosure agrees in writing to keep the disclosure confidential and in a manner consistent with this section; and

(iii) the Commissioner is satisfied that the agency will preserve the confidential nature of the information.

(3) Notwithstanding the provisions of this subsection, final reports of examinations are considered public documents and[***44] may be disclosed to the public. (Emphasis added.)

There are important reasons for requiring confidentiality until the MIA completes its investigation and affords aggrieved parties an opportunity to challenge the charges and findings reflected in the MIA's proposed examination report. The Attorney General has recognized that preserving the confidential nature of the contents of a preliminary examination report [**104] preserves the right to contest and obtain corrections to a proposed report. See 78 Md. Att'y Gen. 233 (1993). On behalf of the MIA, Commissioner Larsen recently explained that the MIA construes subsection [HN37] 2-209(g) as imposing a duty of confidentiality with respect to any information, findings, and charges that have not been "tested" via the administrative procedures established under subsection 2-209(c). In *Nagy v. Baltimore Life Ins. Co.*, 49 F. Supp. 2d 822 (D. Md. 1999), *aff'd in part and vacated in part on other grounds*, 2000 U.S. App. LEXIS 12307 (4th Cir. June 5, 2000), the Commissioner successfully moved to quash a subpoena for documents that would have disclosed particular concerns that the MIA had expressed about a certain insurer[***45] before the MIA's examination report became final. See 49 F. Supp. 2d at 825. Among these documents were letters from an MIA examiner to representatives of the company under examination. The Commissioner argued that disclosing information from the period during which a proposed report remained subject to challenge and correction in an administrative hearing would violate subsection 2-209(g) and "Maryland . . . decisional authority." See 49 F. Supp. 2d at 825. An MIA examiner stated in an affidavit to the federal court that Larsen had authorized him to assert the "privilege" created by subsection 2-209(g). Asserting that [HN38] under subsection 2-209(g), "the [*364] Commissioner is not permitted to disclose information gained from [an] examination except to other State's insurance regulatory agencies or to law enforcement agencies," he explained that such disclosures chill the MIA's deliberative process, by exposing any disclosures by witnesses, and any changes that the MIA might make during a challenge to its preliminary concerns during the investigation and its preliminary findings in the proposed report.

For this reason, he asserted, it has been MIA's "long standing . . . practice to protect the confidentiality[***46] of all preliminary examination reports and the documents generated during an examination." Under subsection 2-209, "it is also . . . regular business practice to revise the proposed report before its issuance upon . . . consideration of the facts and legal arguments submitted by the [examinee]."

We give due weight to the Commissioner's interpretation of subsection 2-209(g) as imposing on him a duty of confidentiality in order to preserve the right of aggrieved persons to speak freely to the MIA during its investigation and the period before the report becomes final, so that they might challenge and correct the MIA's findings before the MIA makes public any injurious charges. See, e.g., *Adamson v. Correctional Medical Svcs., Inc.*, 359 Md. 238, 266, 753 A.2d 501 (2000) (" [HN39] courts give significant weight to the agency's interpretation of the statute that it is required to administer"). We agree with the district court and the Commissioner that the confidentiality requirement of subsection 2-209(g) is designed, *inter alia*, to ensure that the MIA's final report, and its remedial actions, are not tainted by public "grandstanding" before aggrieved persons have had an[***47] opportunity to contest and correct the MIA's preliminary findings.

2.

Chinwuba Alleged That Larsen's Public Statements

And Disclosures During The Confidentiality Period

Were Outside The Scope Of His Public Duties

Chinwuba alleged in the "background" paragraphs of his complaint that before the proposed report became final in [*365] March 1999, "Larsen willfully, maliciously, and blatantly violated the Maryland Insurance [**105] Code," by providing the Washington Post and the Baltimore Sun copies of his March 11, 1998 letter to PrimeHealth's attorneys and PrimeHealth's March 27 reply letter, and also by making "verbal statements regarding his investigation of PrimeHealth and Chinwuba to the media and the public." He also alleged that Larsen improperly "made these . . . disclosures to the media and public regarding PrimeHealth, and Chinwuba even before communicating those statements to either PrimeHealth or Chinwuba."

Chinwuba incorporated these allegations in his defamation count, and further alleged that:

109. Larsen's verbal and written disclosures to the media and other third parties regarding PrimeHealth and Chinwuba during his investigation were false, [***48] derogatory and defamatory statements. These disclosures alleged that Chinwuba provided "false and misleading" testimony to MIA in an effort to obtain a certificate of authority for PrimeHealth from MIA. . . .

113. These statements are defamatory per se intending to injure Plaintiff in his profession and employment and his standing in the community, and further impugning him [sic] to be dishonest, fraudulent because these allegations in effect have stated that Chinwuba has provided perjured testimony to MIA.

114. Larsen made these defamatory per se statements knowingly and maliciously and with the intent to cause serious damage to PrimeHealth and Chinwuba and for Larsen's own political gain.

115. Larsen made these defamatory per se statements out of ill will, hatred, and desire to injure Chinwuba and PrimeHealth and in direct violation of the Maryland Insurance Code.

In his false light count, Chinwuba also alleged that:

119. Larsen, through his unlawful, malicious, and willful conduct in making statements to the media which [*366] were defamatory, disparaging and false regarding Chinwuba and PrimeHealth violated the Maryland Insurance Code and other Maryland law.

120. That[***49] based on Larsen's statements, and unlawful written disclosures, several articles were published in the Washington Post and Baltimore Sun stating that Chinwuba was untrustworthy, unfit to own or manage a HMO in the State of Maryland, and that he provided false testimony to the MIA to obtain a certificate of authority for PrimeHealth. . . .

122. Larsen improperly and unlawfully publicized facts about Chinwuba, which placed Chinwuba in a false light by attributing to him conduct, and characteristics, which were false.

123. Larsen knew that the facts published about the Plaintiff were false, or published them with a reckless disregard for the truth of those facts.

In this Court, Chinwuba contends that the trial court erred in dismissing his defamation and false light counts on the grounds that Larsen enjoyed governmental immunity. "Although [Larsen] may be within the scope of his statutory authority to conduct an investigation, he is . . . not within the scope of his statutory authority to discuss the content or findings of [*106]his investigation to the public and the media before the investigative report is finalized[.]" Before we address Chinwuba's argument, however, we first[***50] must resolve a threshold factual question that Larsen belatedly raised during oral argument in this appeal.

3.

Larsen Did Not Establish As A Matter Of Law That

He Made The Challenged Statements And Disclosures Before

The Confidentiality Period Began

At oral argument, Larsen's counsel defended the trial court's favorable decision on the grounds that any challenged statements and disclosures to the press had been made before the confidentiality period under subsection 2-209(g) began. [*367] In support of this contention, he argued for the first time that the MIA's investigation did not begin until April 6, 1998, when the MIA arrived at PrimeHealth's business premises for an on-site examination.

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Larsen's counsel acknowledged that this argument directly contradicts previous statements by the MIA and Larsen in this and other courts, i.e., that the MIA began to investigate in March 1998, but asserted that these statements had been incorrect. In support, he pointed to an April 3, 1998 letter stating that the MIA would arrive at PrimeHealth's business premises on April 6 to examine PrimeHealth's records.

Given the surprise nature of Larsen's new argument, we[***51] permitted Chinwuba to file a supplemental brief addressing it. Chinwuba offers several reasons for rejecting Larsen's contention that the statements and disclosures reflected in the articles did not violate subsection 2-209(g). We find them persuasive.

First, we agree with Chinwuba that, by themselves, paragraphs 41-45 of his complaint are sufficient to allege that the investigation and examination began in March rather than April. Second, we also agree that Larsen's March 11 letter, PrimeHealth's March 27 response letter, and the newspaper articles, all of which were attached to the complaint, provide ample evidence from which a fact finder could infer that the investigation and confidentiality period had begun by the time Larsen sent his March 11 letter to PrimeHealth. Finally, we agree that Larsen may be judicially estopped from denying that the investigation began after March. n10 See *Roane v. [368] Washington County Hosp.*, 137 Md. App. 582, 592-93, 769 A.2d 263, cert. denied, 364 Md. 463, 773 A.2d 514 (2001).

-----Footnotes-----

n10 We shall not resolve this latter issue. We note for the record, however, that the MIA and Larsen obtained relief in prior judicial proceedings during which they represented that the MIA investigation began in March. In our August 30, 2000 opinion regarding PrimeHealth's challenge to the MIA's final report, we stated that "in March of 1998, . . . Larsen directed the [MIA] to conduct an examination of PrimeHealth's financial health." In the transfer of venue hearing, Larsen stated that "the Administration initiated an investigation of PrimeHealth in March of 1998. This investigation was initiated pursuant to the Commissioner's authority to examine the conduct of various insurers." In the hearing on the motion to dismiss this action, Larsen more specifically stated that "on March 11th, 1998, the Commissioner wrote to PrimeHealth stating that PrimeHealth is under investigation and stating the bases for the investigation." The trial court's opinion also stated that the MIA began to investigate and examine PrimeHealth in March 1998.

-----End Footnotes-----

[***52]

It is sufficient for purposes of this appeal to conclude that there is an unresolved factual dispute on this question. Accordingly, we decline to adopt Larsen's belated amendment to his previous factual assertions as a reason to affirm the trial [**107] court's decision. Because we are required to view the allegations and evidence in the light most favorable to Chinwuba, we assume that the MIA began to investigate and examine PrimeHealth and Chinwuba on or before March 11, 1998. Similarly, we must assume for the purposes of our review that Larsen violated his statutory duty of confidentiality, by making public statements that also defamed Chinwuba and placed him in a false light. Applying these assumptions, we now turn to the trial court's conclusion that Larsen was entitled to judgment on governmental immunity grounds.

4.

Larsen Did Not Establish As A Matter Of Law That

He Made The Challenged Statements And Disclosures

Within The Scope Of His Public Duties

The trial court dismissed Chinwuba's claims on the ground that Larsen was acting within his statutory authority when he decided to initiate an investigation of PrimeHealth, and to publish the final report. We[***53] agree that Larsen had the statutory authority to take these actions, that Larsen was acting within the scope of his public duties when he did so, and that he has governmental immunity against any claim arising from these official acts. But in focusing on the decisions to investigate and to publish the final report, the trial court overlooked Chinwuba's specific complaint about

142 Md. App. 327, *, 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Larsen's allegedly defamatory publications during the confidentiality period. Thus, the court did not decide whether Larsen could use [*369] the protective cloak of governmental immunity for claims based on tortious statements that Larsen allegedly made to the press during a period he was statutorily prohibited from doing so.

First, we address whether Larsen's statements and disclosures during the confidentiality period were within the scope of his public duties. In *Sawyer v. Humphries*, the Court of Appeals held that [HN40] the phrase "'scope of the public duties' in the [Maryland] Tort Claims Act is coextensive with the common law concept of 'scope of employment' under the doctrine of respondeat superior" *Sawyer*, 322 Md. at 254. The Court explained that

[HN41] the general test . . . for determining [***54] if an employee's tortious acts were within the scope of his employment is whether they were in furtherance of the employer's business and were "authorized" by the employer. . . . "By authorized is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders." . . . "To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." . . . An important factor is whether the employee's conduct was "expectable" or "foreseeable." . . . Particularly [HN42] in cases involving intentional torts committed by an employee, this Court has emphasized that where an employee's actions are personal, or where they represent a departure from the purpose of furthering the employer's business, or where the employee is acting to protect his own interests, even if during normal duty hours . . . ,the employee's actions are outside the scope of his employment. . . . "Where the conduct of the servant is unprovoked, highly unusual, and quite outrageous," courts tend to hold "that [***55]this in itself is sufficient to indicate that the motive was a [**108]purely personal one" and the conduct outside the scope of employment.

322,Md. at 255-57 (citations omitted)(emphasis added).

[*370] In subsequent decisions, the Court has summarized [HN43] "the overall test" as "whether the tortious acts were done by the [employee] in furtherance of the employer's business and were such as may fairly be said to have been authorized by him." *Ennis v. Crenca*, 322 Md. 285, 293-94, 587 A.2d 485 (1991)(quotation marks and citations omitted); see *Tall v. Bd. of Sch. Comm'rs*, 120 Md. App. 236, 252-53, 706 A.2d 659 (1998). Among the factors to be considered in determining whether a particular tortious act was within the scope of public duties are "whether or not the master has reason to expect that such an act will be done," "the similarity in quality of the act done to the act authorized," "the extent of departure from the normal method of accomplishing an authorized result," and "whether or not the act is seriously criminal." *Sawyer*, 322 Md. at 257 (quotation marks and citations omitted).

[HN44] When the allegations of a complaint raise competing[***56] factual inferences, "the question of whether or not the defendant's actions were within the scope of his employment should not be decided on a motion to dismiss." See 322 Md. at 261; see also *Cox v. Prince George's County*, 296 Md. 162, 170-71, 460 A.2d 1038 (1983)(scope of employment issue was for the jury and should not have been resolved by sustaining a demurrer). But to ensure that the benefit of governmental immunity is realized as early as possible in the litigation process, courts have placed a higher pleading burden on claimants seeking to avoid the bar of governmental immunity. To overcome a motion raising governmental immunity, a plaintiff must allege with clarity and precision those facts which make the act fall "outside the scope of the public employment." See *Manders v. Brown*, 101 Md. App. 191, 216-17, 643 A.2d 931, cert. denied, 336 Md. 592, 650 A.2d 238 (1994). "Magic words" that are not supported by specific facts will not suffice. See *Green v. Brooks*, 125 Md. App. 349, 377, 725 A.2d 596 (1999).

For this reason, [HN45] merely alleging that a public employee's tortious act was unauthorized is not[***57] sufficient to defeat a motion raising a governmental immunity defense. [*371] See *id.* "An act may be within the scope of employment, even though forbidden or done in a forbidden manner, or consciously criminal or tortious" *Tall*, 120 Md. App. at 252 (citation omitted). "An employee's unauthorized conduct might fall within the scope of employment if it was of the same general nature as conduct that was authorized or incidental to that conduct." 120 Md. App. at 253 (citing *Sawyer*, 322 Md. at 256). Specifically, it is not enough to allege that a public employee disobeyed directions, because he or she may have done so as a result of the very type of negligence that governmental immunity was designed to cover.

Accordingly, when a plaintiff such as Chinwuba contends that the particular conduct about which he complains was unauthorized, he must allege specific facts raising an inference that the public employee knew that his conduct was

142 Md. App. 327, *, 790 A.2d 83, **,
2002 Md. App. LEXIS 16, ***

unauthorized. Here, Chinwuba has done so. He alleged that these press contacts were actually prohibited by a statute that directly instructs Larsen, as Commissioner of the MIA, to refrain from making public[***58] statements about "matters related to an examination" before the report of an investigation or examination becomes final. See Ins. § 2-209(g). Citing the Commissioner's interpretation of subsection 2-209(g) [**109] in the Nagy case, he also alleged facts sufficient to raise an inference that Larsen had actual knowledge of his duty of confidentiality under this statute. We must accept that inference as true for purposes of our review. The question, then, is whether Chinwuba's allegation that Larsen knowingly violated subsection 2-209(g) was sufficient to allege that Larsen was not acting within the scope of his public duties when he made the challenged statements and disclosures to the press.

a.

Larsen Did Not Negate The Inference That His

Public Statements During The Confidentiality Period

Were Outside The Scope Of His Public Duties

We have recognized that [HN46] in some circumstances, when a public official acts in knowing violation of a public law that he [*372] or she had a duty to obey, an inference may be drawn that the official had either a personal motive or was "departing" from the employer's business. In Tall, we held that [***59]allegations a teacher used corporal punishment in violation of a statutory prohibition against such punishment raised an inference that the teacher was not acting in furtherance of the school board's purpose. Tall, 120 Md. App. at 260. In Manders, we held that allegations that city council members modified a land urban renewal plan in violation of an open meetings statute raised an inference that they were acting for their own political and social benefit. See Manders, 101 Md. App. at 218. In both cases, we held that the challenged conduct was outside the scope of the public duties entrusted to these officials.

But in these and other cases in which we have held as a matter of law that the public official's conduct was not within the scope of the public employment, the egregious or personal nature of the misconduct precluded any other inference. See, e.g., Wolfe v. Anne Arundel County, 135 Md. App. 1, 12-15, 761 A.2d 935 (2000), cert. granted, 363 Md. 205, 768 A.2d 54 (2001) (affirming summary judgment in favor of county employer based on actions of police officer who raped motorist after a traffic stop, because officer did[***60] not act within the scope of employment); Tall, 120 Md. App. at 260 (affirming dismissal of respondeat superior claim against school board based on actions of teacher who physically disciplined a child with Down's Syndrome for urinating in his pants, leaving raised welts and bruises on student's arms and legs, because teacher did not act "in furtherance of the Board's objective of educating disabled children"); Manders, 101 Md. App. at 218 (reversing dismissal of claims against city council members who secretly changed land use plan, because they did so to obtain political and social favor from those who benefitted). In such cases, the fact that the employee's conduct also violated a statutory prohibition was only one of several factors supporting an "outside the scope" inference.

The tortious statements and disclosures at issue in this case are not so easily characterized as "outside the scope" of [*373] Larsen's public duties. On one hand, Larsen's statements and disclosures were not criminal, they were clearly related to his public duties, and they arguably were "in furtherance" of the MIA's legitimate examination and "incidental" to the performance[***61] of duties entrusted to Larsen, "even though in opposition to . . . express and positive orders." See Sawyer, 322 Md. at 255. Indeed, if Larsen had made these same statements and disclosures to the press after the examination report became final, the only inference we reasonably could draw would be that he did so in the performance of his public duties. See Ins. § 2-209(f). [**110]

On the other hand, given the explicit statutory prohibition against public statements and disclosures during the confidentiality period, Larsen's press contacts arguably were, in the parlance of the Sawyer test, neither "expectable," "foreseeable," nor "of the same general nature as" the type of public disclosures that he was authorized to make. See Sawyer, 322 Md. at 255. We are in no position, from the appellate bench, to assess whether these contacts were "highly unusual" from a historical perspective, but we think the language and purpose of subsection 2-209(g), as well as the Commissioner's prior interpretation of it, suggest that such contacts are "highly unusual."

Given the competing factual inferences regarding whether Larsen's public [***62] statements during the confidentiality period were within the scope of his public duties, we could rest our decision to vacate the trial court's judgment on the defamation and false light counts solely on the existence of a factual dispute as to whether Larsen acted within the scope of his public duties when he made press contacts during the confidentiality period. But we cannot so easily ignore the mandate of subsection 2-209(g). Accordingly, we turn next to Chinwuba's contention that the trial court erred in not holding as a matter of law that Larsen acted outside the scope of his public duties. We shall hold that, if Larsen did make statements to the press that he knew were subject to the confidentiality requirements of subsection 2-209(g), then as a matter of law, he did not do so in the performance of his public duties.

[*374]

b.

Public Statements Made In Violation Of Ins. § 2-209(g)

Are Not Within The Scope Of The Commissioner's Public Duties

Chinwuba argues that allowing a fact finder to conclude that Larsen acted within the scope of his public duties when he made improper statements and disclosures to the press in violation of subsection [***63] 2-209(g) would defeat the purpose of that subsection. He asserts that the legislature imposed the confidentiality requirement in order to ensure a full, adversarial determination of relevant facts before the MIA speaks publicly about the substance of any concerns resulting from an investigation or examination. If the Commissioner can make defamatory statements during the confidentiality period, without consequence, he contends, then the strict limitations on disclosure enumerated in subsection 2-209(g) will become meaningless words on a page.

Except for the Nagy case, there is no reported case law construing subsection 2-209(g). The parties did not point us to any Maryland cases addressing whether a public official stepped outside the scope of his public duties by violating a comparable nondisclosure statute. The only reported Maryland case considering whether a public official's allegedly defamatory statements to the press were made outside the scope of that official's public duties involved a city council member who told a newspaper reporter about an alleged bribe. In *Ennis v. Crenca*, 322 Md. 285, 587 A.2d 485 (1991), the Court of Appeals held that [***64] the council member who reported the alleged bribe 76 days after it took place, and long after the vote to which it allegedly related, did not make the allegedly defamatory report within the scope of her public duties. See 322 Md. at 294-95. The *Ennis* Court concluded that the council member's report directly to the press, instead of to "an appropriate government official," could not be characterized as "incidental to [her] employment as a local elected legislative official." *Id.* at 295 & n.6. [**111]

[*375] In doing so, the Court specifically rejected a claim that "the public derived some benefit from learning that one of its elected officials was allegedly offered a bribe," because "there is nothing peculiar to [the council member's] job as a city council member which created that benefit." *Id.* at 295. The Court explained that, [HN47] although "under some circumstances, an elected official may be acting within the scope of his or her employment when making statements to the press," the official cannot claim to be performing public duties by making false and defamatory statements to the press for his or her own purposes. See *id.* at 296. [***65]

We find the latter observation generally instructive, but recognize that *Ennis* differs from this case. As the Court of Appeals noted, the substance of those press comments did not directly concern the defendant's public duties, and were not subject to a nondisclosure statute. Here, Larsen's alleged press contacts undisputedly concerned matters regarding an investigation and examination that was undertaken pursuant to his duties as Insurance Commissioner. The question is whether these comments were outside the scope of Larsen's public duties because they were specifically prohibited by subsection 2-209(g).

In support of his contention that they were, Chinwuba cites *Manders v. Brown*. In that case, we reviewed the plaintiff's allegations that Crisfield city council members knowingly violated a statutory public meeting requirement in order to secretly approve a project that allegedly advanced their political careers and social status in the community, by approving a land use plan that favored owners of crab houses located in that area. We held that these allegations were sufficient to avoid dismissal on the grounds of governmental immunity. See *Manders*, 101 Md. App. at 203, 218. [***66] But we again find distinguishing features in that case. Unlike Chinwuba, *Manders* did not rely solely on the defendants' alleged statutory violations to establish that the defendants acted outside the scope of their public duties.

Manders [*376] pleaded specific facts to support his allegation that the defendants were acting for political and social gain. He identified the persons and projects that the defendants allegedly favored. He explained that these persons had substantial influence in the community. These details provided specific factual support for his contention that the defendants had a self-interested motive for violating the statute.

In contrast, Chinwuba has not offered any similarly specific factual allegations to support his broad suggestion that Larsen had a personal motive for violating subsection 2-209(g). Although he alleged that Larsen did so for "political gain" or as a result of "racism," those allegations are nothing more than bare and conclusory labels. He has not alleged any comparably detailed facts that might arguably support these accusations.

We think the lack of any "outside the scope of public duty" allegation, other than the statutory violation, makes this[***67] case significantly different from Ennis and Manders. We perceive the question raised by Chinwuba's argument that Larsen acted outside the scope of his public duties as a novel, but very narrow, one. Would Larsen's violation of subsection 2-209(g), by itself, be grounds to hold as a matter of law that Larsen acted outside the scope of his public duties in making improper press statements and disclosures? Searching outside this jurisdiction, we found an instructive case addressing the violation of a similarly specific nondisclosure law. In *Elder v. Anderson*, 205 Cal. App. 2d 326, [**112] 23 Cal. Rptr. 48 (Cal. App. 1962), the trustees of a school district mailed to many households a special announcement of a public meeting to discuss "the serious violation of manners, morals and discipline that occurred . . . as the direct result of interference by the Elder and Fries boys who are now suspended from school." 23 Cal. Rptr. at 49. Mrs. Elder filed a libel claim on behalf of her son, alleging that the trustees had violated a state law prohibiting school officials from "giving out any personal information concerning any particular minor pupil," except as specifically permitted [***68] to parents and certain public officials. Recognizing that "the case before us may be an important one to all public [*377] officials[.]" the Elder Court held that the trustees could not claim governmental immunity. 23 Cal. Rptr. at 52.

In doing so, the court acknowledged the importance of governmental immunity. "To subject citizens serving as public officers to suit and trial in every instance in which their good faith but mistaken actions caused injury to another 'would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" 23 Cal. Rptr. at 53 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)). Nevertheless, the court held that the trustees were not entitled to claim immunity for actions that had been prohibited by statute. It explained that, although the trustees were statutorily authorized to hold an executive session in order to consider disciplinary problems, they could do so "only when it would not violate [the statute] . . . prohibiting the school trustees from giving out personal information concerning a pupil." 23 Cal. Rptr. at 54. Considering the specific nature of the[***69] nondisclosure statute, the court concluded that "we find [this public statement] more than a good faith mistaken action. In this case [the] trustees violated a code section prohibiting dissemination of personal information concerning pupils, and thus stepped outside the protection of their office." 23 Cal. Rptr. at 53. n11

-----Footnotes-----

n11 The California Supreme Court relied on *Elder* in holding that a public entity does not have governmental immunity under California law when it violates a "hard and fast rule" set forth in a legislative enactment that the public entity has a mandatory duty to obey. See *Ramos v. County of Madera*, 4 Cal. 3d 685, 484 P.2d 93, 100-01 & n.11, 94 Cal. Rptr. 421 (Cal. 1971). It also has recognized that [HN48] an allegation that a public official violated a specific nondisclosure statute would constitute a "tenable contention" that the publication was not within the scope of his or her public duties. See, e.g., *Kilgore v. Younger*, 30 Cal. 3d 770, 640 P.2d 793, 799, 180 Cal. Rptr. 657 (Cal. 1982)(failure to plead illegal dissemination of confidential information barred claim against attorney general).

-----End Footnotes-----

[***70]

We find the Elder Court's decision and rationale persuasive in view of the unusually specific confidentiality instructions in subsection 2-209(g). Like the statute in *Elder*, subsection 2-209(g) embodies not only clear legislative policy, but also clear [*378] directives. Although we also have serious concerns about the negative effects of subjecting public officials to suits arising from public statements concerning their official actions, we conclude that this case

involves a narrowly defined circumstance in which a public official may be held personally accountable for alleged defamatory public statements made in violation of a confidentiality statute that specifically prohibits the type of public statements that gave rise to these claims.

Here, Chinwuba alleged that Larsen knowingly made prohibited and tortious statements to the press in violation of a statute he was responsible for executing. We find it significant that [HN49] the nondisclosure instructions in subsection 2-209(g) are specifically directed to "the Commissioner" [**113] of the MIA. It broadly covers disclosures of " [HN50] a preliminary examination report, investigation report, or any other matter related to an examination made under [***71] § 2-205[.]" Ins. § 2-209(g)(1)(emphasis added). It strictly limits disclosure of such information to an exclusive list of public agencies concerned with insurance regulation and law enforcement. See Ins. § 2-209(g)(1)-(2). Even then, it prescribes that disclosures may be made to such agencies only " [HN51] for regulatory, law enforcement, or prosecutorial purposes," and only if "the agency receiving the disclosure agrees in writing to keep the disclosure confidential" and "the Commissioner is satisfied that the agency will preserve the confidential nature of the information." Ins. § 2-209[g](2)(i)-(iii). In these circumstances, if the Commissioner elects to make public statements that are prohibited by subsection 2-209(g), then he or she does so outside the protection of his or her public office, and at the risk that he or she may be held accountable for any tortious statements.

Our conclusion that, [HN52] as a matter of law, disclosures in violation of subsection 2-209(g) cannot be made "in the performance of the Commissioner's public duties" is bolstered by the history of subsection 2-209(g). Before [***72] subsection (g) was added, the Commissioner had broad discretion to publicly disseminate information relating to an ongoing examination at any time before the final examination report was filed, if he or she determined that doing so was in the best interests of the [*379] public. See former Md. Code (1957, 1994 Repl. Vol.), Art. 48A, § 34(4) ("The Commissioner . . . may at any time testify and offer other proper evidence as to information secured during the course of an examination, whether or not a written report of the examination has at that time been either made, served, or filed in the Commissioner's office"); id. at § 34(5) ("Commissioner may withhold from public inspection any examination or investigation report for so long as he deems the withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest"); 78 Op. Att'y Gen. 233, *4 (1993) ("Nothing in this statute prevents the Commissioner from making . . . a preliminary examination report public at any time"). In practice, however, the Commissioner historically did not publish preliminary reports, "in order to protect the examined company from unfair[***73] publicity should the [MIA] determine that the preliminary report is incorrect and requires amendment." 78 Op. Att'y Gen. 223, at *4.

In 1994, the legislature amended section 2-209 to add the nondisclosure provisions of subsection (g). See 1994 Md. Laws, Chap. 551, § 1. The purpose of severely restricting disclosure of information related to an ongoing investigation or examination is apparent in the language of both the old and the new disclosure provisions. Even before subsection (g) was added, this statute required the Commissioner to exercise discretion in a manner that avoided "unwarranted injury" to those affected by an MIA investigation. See former Art. 48A, § 34(5). In practice, the Commissioner adopted a policy of not disclosing proposed reports in order to prevent the disclosure of harmful, but untested findings. See 78 Op. Att'y Gen. 233, *4. The addition of subsection (g) elevated this concern about the damaging effects of premature charges by the MIA, by explicitly removing any discretion the Commissioner previously might have exercised to make disclosures while the proposed report was being litigated to finality. By preventing[***74] public disclosure of preliminary information, the legislature made it less likely that the MIA will become "entrenched" in a [*380] viewpoint that has not been adversely tested via the procedural protections specified in subsection 2-209. [**114]

For the benefit of the public and those aggrieved by the MIA's actions, the legislature imposed what, in effect, is a "gag rule" that has only a few narrowly defined exceptions. None of these exceptions permit the Commissioner to provide the press with confidential correspondence to and from insurers concerning the substance of an ongoing MIA investigation and examination.

Chinwuba alleges that, at the time Larsen made the statements and disclosures at issue here, he fully understood he was responsible for preserving the right to contest and obtain modifications to the MIA's preliminary findings, by preventing public disclosure of such matters lest they have a chilling effect on the deliberative process. See Nagy, 49 F. Supp. 2d at 826. We conclude that Chinwuba adequately alleged specific facts that raised a factual dispute about whether Larsen made tortious statements to the press and whether he did so during the confidentiality period[***75] he knew had been established by subsection 2-209(g). We hold that if a fact finder concludes that Larsen knowingly made

prohibited statements and disclosures during the confidentiality period, then, as a matter of law, Larsen acted outside the scope of his public duties and cannot claim the cloak of governmental immunity in any tort claim based on such impermissible publications.

5.

Chinwuba Has Not Alleged Facts

Sufficient To Raise An Inference Of Malice

As alternative grounds for reversing the trial court's ruling that his claims are barred by governmental immunity, Chinwuba argues that "whether [Larsen] acted with malice when he acted deliberately against the express dictates of the statute is a question for the jury to decide." n12 Chinwuba [*381] contends that just as an "outside the scope of duty" inference can be drawn from his allegations that Larsen violated the nondisclosure provisions of subsection 2-209(g), so too can a "malice" inference be drawn from the same allegations.

-----Footnotes-----

n12 The trial court did not address whether Larsen's allegedly improper disclosures to the press could be evidence that Larsen was grossly negligent, and therefore, not protected by the qualified governmental immunity for state employees under the MTCA. Chinwuba has not raised any issues with respect to a gross negligence theory against Larsen. [HN53] We will not address this issue, because Chinwuba and the trial court did not. See *Lovelace v. Anderson*, 366 Md. 690, 785 A.2d 726 (Md. 2001).

-----End Footnotes-----

[***76]

In focusing solely on the question of whether Larsen was acting within the scope of his public duties when he made the allegedly tortious public statements about Chinwuba, the trial court did not directly address whether a violation of subsection 2-209(g), standing by itself, is sufficient to allege malice. The court's decision, however, is an implicit rejection of such an argument.

Chinwuba is correct in asserting that even if Larsen was acting within the scope of his public duties when he made the alleged disclosures, he still might have been acting with malice sufficient to defeat his qualified immunity. See *Sawyer*, 322 Md. at 262. [HN54] State officials who commit torts within the scope of their public duties do not have governmental immunity if they act with malice. See CJ § 5-522(b); *Thomas v. City of Annapolis*, 113 Md. App. 440, 456, 688 A.2d 448 (1997). The Court of Appeals has held that there is no "reason why a public official should not be held responsible for his malicious actions even though he claims they were [**115] done within the scope of his discretionary authority." *Robinson v. Bd. of County Comm'rs*, 262 Md. 342, 348, 278 A.2d 71 (1971);[***77] see also *Thomas*, 113 Md. App. at 456 ("common law public official immunity is not available with respect to deliberate acts that form the basis for intentional torts or acts committed with actual malice").

"Malice may be inferred from the surrounding circumstances." *Green v. Brooks*, 125 Md. App. 349, 377, 725 A.2d 596 (1999). Thus,
[*382]

the question raised for purposes of immunity under the State Tort Claims Act is whether a jury could reasonably find that petitioners' conduct, given all of the existing and antecedent circumstances, was motivated by ill will, by an improper motive, or by an affirmative intent to injure That motive or animus may exist even when the conduct is objectively reasonable. If it does, there is no immunity under the State Tort Claims Act.

Shoemaker v. Smith, 353 Md. 143, 164, 725 A.2d 549 (1999).

[HN55] Whether a complainant has sufficiently alleged malice is a question of law. See *id.* at 167. In making that determination, courts must draw all inferences regarding credibility and factual disputes in favor of the plaintiff. See

142 Md. App. 327, *; 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

Porterfield v. Mascari II, Inc., 142 Md. App. 134, 2002 Md. App. LEXIS 2, *4-5, 788 A.2d 242 (Md. App. 2002). [***78] We recognize that "because the determination of malice, in particular, involves findings as to the defendant's intent and state of mind, there is much less likelihood of it presenting an 'abstract issue of law.'" Shoemaker, 353 Md. at 168. Nevertheless, to defeat a motion based on governmental immunity, a plaintiff must point to facts sufficient to raise an inference of malice. "The plaintiff 'must allege with some clarity and precision those facts which make the act malicious.'" Green, 125 Md. App. at 377 (quoting Elliott v. Kupferman, 58 Md. App. 510, 528, 473 A.2d 960 (1984)).

Plaintiffs may not rely upon the mere existence of such an intent, motive, or state of mind issue Because a defendant's subjective intent is an element of the plaintiff's claim, the plaintiff must point to specific evidence that raises an inference that the defendant's actions were improperly motivated in order to defeat the motion. That evidence must be sufficient to support a reasonable inference of ill will or improper motive.

Thacker v. City of Hyattsville, 135 Md. App. 268, 301, 762 A.2d 172 (2000), [***79]cert. denied, 363 Md. 206, 768 A.2d 55 (2001).

[*383] We have considered whether allegations were sufficient to raise an inference of a racial or personal animus in various situations. In Nelson v. Kenny, 121 Md. App. 482, 494-95, 710 A.2d 345 (1998), we reversed summary judgment in favor of an arresting officer because there was evidence supporting an inference that she intentionally humiliated and embarrassed the plaintiff out of racial animosity toward the plaintiff. In Leese v. Baltimore County, 64 Md. App. 442, 480, 497 A.2d 159, cert. denied, 305 Md. 106, 501 A.2d 845 (1985), we reversed the dismissal of a county employee's complaint against his supervisors because he adequately alleged that they wrongfully terminated him in order to satisfy that animosity and harm the plaintiff. In Thacker v. City of Hyattsville, 135 Md. App. at 308-09, we reversed summary judgment because there was sufficient evidence to support an inference that the officer made a decision to arrest out of racial, personal, or financial animosity toward the plaintiff.

[**116]

But we also have rejected attempts to rely on bare allegations[***80] that a particular act raises an inference of malice. See, e.g., Baltimore Police Dep't v. Cherkes, 140 Md. App. 282, 330-31, 780 A.2d 410 (2001) (bare allegation of malice not sufficient to avoid dismissal of claims arising from training of police officers who allegedly assaulted plaintiff); Tavakoli-Nouri v. State, 139 Md. App. 716, 730 n.2, 779 A.2d 992 (2001)(bare allegation of national origin discriminations did not state claim for violation of constitutional rights); Green, 125 Md. App. at 380 (bare allegation of malice not sufficient to avoid dismissal of claim arising from arrest resulting from mistaken identity); Penhollow v. Bd. of Comm'rs, 116 Md. App. 265, 294-95, 695 A.2d 1268 (1997)(bare allegation of gender bias not sufficient to avoid judgment on discrimination claim); Williams v. Prince George's County, 112 Md. App. 526, 551, 685 A.2d 884 (1996) (bare allegation of malice not sufficient to avoid judgment on claim arising from wrongful arrest).

In this case, Chinwuba argues that his allegations are sufficient to state a claim that Larsen deliberately made [*384] tortious public statements in order to humiliate[***81] or harm Chinwuba, or to benefit his own political career or reputation. We do not agree. By itself, we do not view the bare allegation that Larsen violated subsection 2-209(g) as "specific evidence . . . sufficient to support a reasonable inference of ill will or improper motive." Thacker, 135 Md. App. at 301. Chinwuba's allegation that Larsen made these improper statements for "political gain" did not relate specifically to the potentially actionable statements made during the confidentiality period. Moreover, as we have already discussed, Chinwuba did not allege or point to any specific facts that would support his bald allegations of personal animus, political gain, or racial bias. Cf. Thacker, 135 Md. App. at 305-06 (arresting officer made allegedly racial comment and had expressed dislike of arrestee); Nelson, 121 Md. App. at 494-95 (arresting officer responded favorably to overtly racial complaint); Manders, 101 Md. App. at 218 (council members allegedly sought to curry political and social favor of influential business owners in community). It appears that these allegations are simply Chinwuba's "conjecture based[***82] on his characterization." See Tavakoli-Nouri, 139 Md. App. at 730 n.2. [HN56] Bald assertions and conclusory statements regarding an unsavory motive, unsupported by any specific factual detail, are not sufficient to raise an inference of malice, or to withstand a motion to dismiss. See Green, 125 Md. App. at 380.

C.

The Trial Court Erred In Holding That Any Public

Statements Made By Larsen In Violation Of

Subsection 2-209(g) Were Absolutely Privileged

The trial court also held that any wrongful statements or disclosures that Larsen may have made were protected by an absolute privilege covering the head of a State agency. Chinwuba challenges this holding on two different grounds. We address each separately, finding merit in both.

[*385]

1.

Larsen Does Not Have An Absolute Privilege To Make Defamatory Statements Outside The Performance Of His Public Duties

The trial court dismissed Chinwuba's defamation and false light counts because Larsen, "as 'head of a state department,' acting as the Maryland Insurance Commissioner, is entitled to [an] absolute [**117] privilege." n13 In doing so, the trial court adopted a tort law[***83] doctrine recognized in the Restatement (Second) of Torts, which provides that [HN57] even defamatory statements made by a "governor or other superior executive officer of a state" are absolutely privileged if the defamatory communication is "made in the performance of his [or her] official duties." See Restatement § 591(b). The Restatement states that this absolute privilege extends to "the heads of state departments[.]" Id. at cmt. c.

-----Footnotes-----

n13 The same absolute and conditional privilege defenses against defamation are also available as defenses to false light claims. See Restatement § 652G.

-----End Footnotes-----

" [HN58] An absolute privilege is one which provides complete immunity and applies . . . 'principally to (1) judicial proceedings; (2) legislative proceedings; (3) in some cases to executive publications; (4) publications consented to; (5) publications between spouses; and (6) publications required by law.'" Gohari, 363 Md. at 55 n.13 (citation omitted). The Court of Appeals recently explained that[***84] "the difference between an absolute privilege and a qualified [or conditional] privilege is that 'the former provides immunity regardless of the purpose or motive of the defendant, or the reasonableness of his conduct, while the latter is conditioned upon the absence of malice and is forfeited if it is abused.'" Id. (citation omitted).

In the trial court, Chinwuba asserted that Larsen did not have an absolute privilege to make defamatory statements to the press in violation of subsection 2-209(g), because those [*386] communications were not "made in the performance of his official duties." In this Court, he renews that argument.

We agree that the same factual dispute that precluded judgment on the governmental immunity issue also precludes judgment on privilege grounds.

[HN59] The absolute privilege . . . exists only when the officer . . . publishes the defamatory matter in the performance of his official duties, or within the scope of his line of duty. . . . It is enough that the publication is one that the officer is authorized to make in his capacity as an officer. Thus the head of a . . . state department may be authorized to issue press releases giving the public information[***85] concerning the conduct of the department, or events of public interest that have occurred in connection with it; and if he is so authorized he is within the scope of his official duties when he gives the information to the press.

Restatement § 591 cmt. f.

In Walker v. D'Alesandro, 212 Md. 163, 170, 129 A.2d 148 (1957), the Court of Appeals held that the scope of an executive official's absolute privilege should not be extended by an unduly broad concept of his or her official duties. Without deciding whether the mayor of Baltimore had an absolute privilege, the Court concluded that his decision to

remove a particular painting from a public gallery was not within the scope of his public duties. Noting that "no State law or City ordinance authorizing the exercise of powers of censorship by the Mayor and the removal of pictures which he may deem objectionable has been cited to us," the Court explained why the mayor could not assert an absolute privilege. 212 Md. at 172.

Even if the picture were objectionable, we do not regard the censorship by the Mayor of pictures publicly exhibited in a City-owned building and the removal of such as[***86] he may deem objectionable, or his making adverse public comments thereon, as being either within the scope [**118] of his duties as Mayor or so closely related thereto as to be entitled to an [*387] absolute privilege by reason of his important public office. This Court long ago expressed opposition to the extension of the doctrine of absolute privilege (*Maurice v. Worden*, 54 Md. 233) to persons occupying offices not previously recognized as falling within the protection of absolute privilege. Though we are not deciding in this case whether or not the doctrine of absolute privilege should be extended to such an office as that of Mayor of a great city, we think that the same reasoning which underlies the reluctance to extend the offices to which the privilege applies, should also make us reluctant to stretch the field in which an absolute privilege may be invoked by adopting a very broad view of what may be deemed closely related to the general matters committed to the control or supervision of a public officer.

212 Md. at 172-73. Applying this narrow view of the scope of the mayor's public duties, the Walker Court held that "none of the acts complained of (including the[***87] statements alleged to have been made) are within the actual field of the defendant's powers or duties as Mayor or so closely related thereto as to be entitled to an absolute privilege, assuming (but not holding) such privilege to be accorded to the holder of that office." 212 Md. at 173.

Thus, even if Larsen enjoyed an absolute privilege as the head of a State agency (although we conclude in Part II.C.2 that he does not), he was not entitled to assert a privilege defense for the same "scope of public duties" reasons that he was not entitled to judgment on governmental immunity grounds. The trial court's error in determining that Larsen's public statements fell within the scope of his duties also tainted its finding that Larsen had an absolute privilege barring claims based on his allegedly tortious statements during the confidentiality period. n14 We hold that any unauthorized [*388] tortious statements that Larsen made in violation of subsection 2-209(g) were not made in the performance of his public duties as Insurance Commissioner.

-----Footnotes-----

n14 The allegations that Larsen's improper statements were made to the public, through the press, at a time that he had a duty of confidentiality, distinguishes this case from *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wn. App. 546, 878 P.2d 1259 (Wash. App. 1994), rev. denied, 126 Wn.2d 1002 (1995), cited by Larsen. In that case, the defendants did not make statements that were statutorily prohibited at the time they were made. 878 P.2d at 1270-71. Similarly, in *Compton v. Romans*, 869 S.W.2d 24 (Ky. 1993), also cited by Larsen, the court's holding that the head of the Kentucky Racing Commission was entitled to an absolute privilege defense against claims that he made tortious statements to the media was premised on the fact that he had discretion to make the public statements in question. See 869 S.W.2d at 27-28.

-----End Footnotes-----

[***88]

We reject Larsen's contentions that he was merely "performing his job" by "conveying information to the public about . . . matters [he is] assigned to regulate," and that "this lawsuit vividly demonstrates why such statements must necessarily be privileged." To be sure, the concept of absolute executive privilege promotes important public policies by freeing executives from liability concerns. See Restatement § 591 cmt. a. But these policies are not unduly threatened by our narrow ruling that [HN60] an executive is not entitled to an absolute privilege defense against a claim that he made tortious public statements in violation of a specific statute prohibiting such statements. In this instance, if Larsen was violating his public duty as defined by subsection 2-209(g), affording him an absolute executive [**119] privilege would destroy the very statute that he was sworn to execute.

Larsen Does Not Have An Absolute Privilege

Based On His Position As The Head Of A State Agency

There is no Maryland precedent on the question of whether the Insurance Commissioner has an absolute privilege defense against a defamation or false light claim. Because [HN61] this novel issue will[***89] arise again on remand, and Chinwuba raised it in this appeal, we address it for the convenience and guidance of both the court and the parties. See Md. Rule 8-131(a).

The trial court concluded that, by virtue of his important public office, Larsen had an absolute privilege, rather than a [*389] conditional privilege. It relied on the Restatement, which states that all of the state courts that have considered the question have agreed that the absolute privilege . . . protects the superior officers of the state governments, including at least the governor, the attorney-general or the heads of state departments whose rank is the equivalent of cabinet rank in the Federal Government.

Restatement § 591 cmt. c. But the Restatement reporters also note that "the majority of the state courts have declined to extend the absolute privilege beyond the superior state officers and have recognized as to other officers only a conditional privilege." *Id.*, reporters' notes on clause (b); see, e.g., *Vander Linden v. Crews*, 205 N.W.2d 686, 691 (Iowa 1973) (no absolute privilege for state board of pharmacy secretary); *Vigoda v. Barton*, 348 Mass. 478, 204 N.E.2d 441, 445 (Mass. 1965)[***90] (same - superintendent of state hospital); *Stukuls v. New York*, 42 N.Y.2d 272, 366 N.E.2d 829, 834, 397 N.Y.S.2d 740 (N.Y. 1977)(same - president of state college); *Thomas v. Nicholson*, 21 V.I. 561, 564 (V.I. 1985)(same - executive director of lottery).

[HN62] "The question whether a defamatory statement should be absolutely privileged involves a matter of public policy in which the public interest in free disclosure must be weighed against the harm to individuals who may be defamed." *Adams v. Peck*, 288 Md. 1, 5, 415 A.2d 292 (1980). Historically, the Court of Appeals has expressed great reluctance to extend either an absolute privilege under defamation law or an absolute immunity in other tort law contexts to a broad range of executive officials. In its benchmark case regarding absolute privilege for executive officials, *Maurice v. Worden*, 54 Md. 233 (1880), the Court held that the Superintendent of the United States Naval Academy was not entitled to an absolute privilege under Maryland defamation law. See 54 Md. at 253-54. Even though his allegedly defamatory publication "was made in the line of duty," the[***91] Court held that "this only clothes it with a privilege that is qualified." 54 Md. at 254. "The doctrine of absolute immunity is so inconsistent with the [*390] rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions." 54 Md. at 253-54.

The Court of Appeals consistently has reaffirmed the narrow scope of the absolute privilege for executive communications. In *McDermott v. Hughley*, 317 Md. 12, 561 A.2d 1038 (1989), it described the continuing "reluctance of Maryland courts to extend absolute privilege beyond official communications to the heads of government and between departments[.]" 317 Md. at 24 (citing *Maurice*, 54 Md. at 233). Consequently, absolute privilege has been "afforded [only] to comments made with respect to . . . the activities of a limited number of high ranking executive officers." *Id.*[**120]

Maryland's reluctance to extend an absolute privilege solely on the basis of a job title mirrors the prevailing trend in federal courts and in many other jurisdictions. That trend, in both the narrow context of defamation[***92] privileges and the analogous context of absolute immunity from tort liability, is to determine whether an absolute bar to liability exists by focusing on the executive official's public duties rather than on the title of his or her public job. See *Mandel v. O'Hara*, 320 Md. 103, 118-21, 576 A.2d 766 (1990).

The Supreme Court has taken a functional approach to the question, with an understanding that in most cases, a qualified privilege or immunity provides sufficient protection to executive officials. See *id.*; see also *Barr v. Matteo*, 360 U.S. 564, 573, 79 S. Ct. 1335, 1340, 3 L. Ed. 2d 1434 (1959)("It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted"). Thus, courts have tended to adopt a general rule of conditional privilege for most executives, for the same reasons that they have adopted a general rule of qualified immunity for the same officials.

We find the Supreme Court's rationale for refusing to extend the absolute immunity enjoyed by the President of the United States to his appointed cabinet members and staff provides a sound explanation for why a conditional[***93] [*391] privilege provides adequate protection for all but the highest executive officials in this State. For "executive officials in general, . . . qualified immunity represents the norm." *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S. Ct. 2727, 2732, 73 L. Ed. 2d 396 (1982). "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986). "Where an official could be expected to know that certain conduct would violate statutory . . . rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow*, 457 U.S. at 819, 102 S. Ct. at 2739. Accordingly, " [HN63] the burden of justifying absolute immunity rests on the official asserting the claim." *Id.*, 457 U.S. at 812, 102 S. Ct. at 2735. An executive official seeking absolute immunity "first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability." *Id.*, 457 U.S. at 813, 102 S. Ct. at 2735. [***94]Next, the official "must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." *Id.*

Applying these principles in the executive privilege context, we conclude that Larsen is not entitled to assert an absolute privilege defense to the defamation and false light counts. Although Commissioner Larsen is the head of a Maryland state agency, [HN64] the Maryland Insurance Administration is an independent executive agency, not a principal, or "cabinet-level" department. See Ins. § 2-101(a)(2); Maryland Manual 2001, at 160, 245. In other tort contexts, Larsen has only a qualified immunity. See CJ § 5-522(b). In this defamation context, Larsen has not offered any reasonable justification for why his public office should be given an absolute, rather than a conditional, privilege to make defamatory public statements.

We hold that [HN65] the Insurance Commissioner may assert only a conditional privilege. A conditional privilege affords adequate protection for any statements that the Commissioner [*392] may make in the proper exercise of his or her discretion to communicate[***95] [**121] with the public regarding important insurance regulatory matters.

This conditional privilege has the same "scope of duty" limitation as an absolute privilege or a qualified immunity. " [HN66] One who upon an occasion giving rising to a conditional privilege publishes defamatory matter concerning another, abuses the privilege if he does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given." Restatement, [Torts 2d] § 605. Because there is no conditional privilege to make tortious statements that are not within the scope of one's public duty, a conditional privilege may be lost by excessive publication to third parties "other than those whose hearing is reasonably believed to be necessary or useful to the protection of the interest[.]" *Gen'l Motors Corp. v. Piskor*, 277 Md. 165, 173, 352 A.2d 810 (1976). "Resolution of whether the [conditional] privilege has been abused . . . is ordinarily a jury question." *McDermott*, 317 Md. at 30. In this case, the dispute regarding whether Larsen made tortious public statements outside the scope of his public duties, by excessively publishing them to the press in violation of subsection[***96] 2-209(g), also precluded dismissal on the basis of a conditional privilege.

D.

The Absolute Judicial Privilege For Defamatory

Statements Did Not Encompass All Of The

Defamatory Statements Alleged In This Case

The trial court also held that "some of the published statements fall within the judicial proceedings privilege," including the absolute privilege for "communication that was made in preparation for litigation" It specifically found that

the statements complained of, for example, the statements that the certifications were false and misleading or the publication of information in the Report, are within the privilege. Therefore, [Chinwuba] cannot complain of any Petition or other pleading filed by the Commissioner or any [*393] statement made in the course of the receivership

proceedings, or of any newspaper articles accurately summarizing such pleadings or statements because they fell within the Judicial Privilege.

" [HN67] Statements uttered in the course of a trial or contained in pleadings, affidavits, or other documents related to a case fall within an absolute privilege, and therefore cannot serve as the basis for an action in defamation." Woodruff v. Trepel, 125 Md. App. 381, 391, 725 A.2d 612, [***97] cert. denied, 354 Md. 332, 731 A.2d 440 (1999). Thus, we agree with the trial court that statements Larsen made in any pleading filed in any judicial or quasi-judicial proceeding undertaken in any case relating to Chinwuba, including the PrimeHealth receivership proceedings, were "judicially privileged." n15

-----Footnotes-----

n15 We also note that any allegedly defamatory statements contained in the body of the proposed report were made by the MIA, through named MIA examiners who are not parties to this action. As we previously held in section II.A, Chinwuba's claims against the MIA are barred by his failure to give the notice required under the MTCA.

-----End Footnotes-----

Where we part company with the trial court is on whether the privilege covers publication of the challenged statements Larsen made in his March 1998 letters to PrimeHealth, and any statements he made directly to the press, in violation of subsection 2-209(g). We recognize that [HN68] statements in a document that was prepared for possible use in litigation, but not actually [***98] filed in a judicial or quasi-judicial proceeding, may be within the scope of the judicial privilege. See, e.g., [**122] Adams, 288 Md. at 7-8 (judicial privilege covered psychiatrist's opinion that father had abused child, made in evaluation report, because it was prepared in connection with contested divorce proceeding); Woodruff, 125 Md. App. at 394 (privilege covered attorney's statement that father abused child, made in letter to father's attorney, because it related to pending litigation and potential future litigation regarding child custody and visitation); Arundel Corp. v. Green, 75 Md. App. 77, 85, 540 A.2d 815 (1988)(privilege covered attorney's statement in letter sent to [*394] employees of crushed stone supplier, requesting information relating to asbestos exposure from stone dust, because it was made in preparation for litigation).

But we recently cautioned that the scope of judicial privilege "is not boundless." Woodruff, 125 Md. App. at 397. In Woodruff, we emphasized that absolute privilege for judicial proceedings should not be extended when doing so does not serve the important public interest for which [***99] it was created - "the unfettered disclosure of information needed for a judicial or quasi-judicial decision-making process." 125 Md. App. at 399. We also recognized that a judicially privileged disclosure must be made in a forum that has adequate procedural safeguards designed to minimize the occurrence of defamatory statements. See Gersh v. Ambrose, 291 Md. 188, 197, 434 A.2d 547 (1981); Woodruff, 125 Md. App. at 399. We pointed out that courts have declined to extend an absolute judicial privilege when the challenged statement was made to an entity with no conceivable role in a judicial or quasi-judicial proceeding, or was made in a forum that does not provide adequate procedural protections. See, e.g., Gersh, 291 Md. at 196 (no absolute privilege for witness testifying before community relations commission, because it was tantamount to "an ordinary open public meeting" with no procedural safeguards for defamed persons); McDermott, 317 Md. at 26 (no absolute privilege for psychologist's report to police department employing plaintiff, because "there was no public hearing adversary in nature; no compellable [***100] witnesses were sworn or cross-examined; no reviewable opinion or analysis was generated"); Kennedy v. Cannon, 229 Md. 92, 98-99, 182 A.2d 54 (1962)(defense attorney's defamatory statements to press relating to pending criminal proceeding were not absolutely privileged because they had no relation to the prosecution); Woodruff, 125 Md. App. at 399-400 (no absolute privilege for plaintiff who republished allegedly defamatory letter about ex-husband to school principal, because school had no judicial role and report "did not further the administration of justice").

[*395]

In this case, we hold that the absolute judicial privilege does not extend to any letters or direct statements to the press that Larsen may have given during the confidentiality period. The publication of these letters and statements to the press does not serve any judicial purpose, because the press could not play a role in any judicial or administrative proceeding relating to PrimeHealth or Chinwuba. Cf. Kennedy, 229 Md. at 99 ("an attorney who wishes to litigate his case in the

142 Md. App. 327, *, 790 A.2d 83, **,
2002 Md. App. LEXIS 16, ***

press will do so at his own risk"); Woodruff, 125 Md. App. at 399 ("the[***101] school is not a tribunal and is not engaged in a judicial or quasi-judicial role"). Moreover, publication of such statements via informal press contacts provides absolutely no procedural safeguard that would minimize the prospect of defamatory statements. Cf. McDermott, 317 Md. at 26 ("most significantly, [the public employee] did not have the opportunity to present his side of the [**123] story"); Gersh, 291 Md. at 196 ("the public benefit to be derived from testimony at Commission hearings of this type is not sufficiently compelling to outweigh the possible damage to individual reputations to warrant absolute [judicial] immunity").

To the contrary, we view subsection 2-209(g) as a legislative directive that the MIA must refrain from making public accusations of wrongdoing against persons under investigation until its examination is complete and its proposed report has become final, precisely because such untested accusations do not provide an aggrieved person adequate procedural protections to minimize the possibility of the MIA inflicting "unwarranted injury" by publishing inaccurate or untrue charges. Accordingly, we hold that any statements[***102] that Larsen knowingly made to the press in violation of subsection 2-209(g) are not protected by an absolute judicial privilege.

E.

The Trial Court Properly Dismissed

Chinwuba's Abuse of Process Claim Against Larsen

The trial court dismissed Chinwuba's [HN69] abuse of process claim in Count III because he failed to allege the essential [*396] element of willful misuse of process in a manner not contemplated by law. See *One Thousand Fleet Ltd. P'ship v. Guerriero*, 346 Md. 29, 38, 694 A.2d 952 (1997). We shall affirm the judgment. If Chinwuba intended to complain about the initiation and prosecution of the receivership action against PrimeHealth, he did not specifically do so. Even if he had, there was ample evidence to support a judgment in favor of Larsen, given that PrimeHealth consented to the receivership, thereby validating the use of process in the receivership proceedings.

F.

The Trial Court Properly Entered Summary Judgment

On Chinwuba's Due Process Claim Against Larsen

Chinwuba complained in Count IV that he was denied "an opportunity for a hearing to disprove" potentially criminal allegations that he "provided false testimony[***103] under oath . . . to obtain a certificate of authority for PrimeHealth," and that "he should not be trusted in his business activities with PrimeHealth[.]" Asserting violations of Articles 24 and 26 of the Maryland Declaration of Rights, Chinwuba again points to Larsen's illegal and "stigmatizing leaks to the newspapers in violation of . . . § 2-209(g)."

Based on pleadings and evidence outside the complaint, the trial court granted summary judgment in favor of Larsen. n16 The court held that (1) this issue was finally adjudicated in a prior appeal; (2) Chinwuba had ample opportunity to present his argument, which was ultimately incorporated into the final [*397] report; and (3) he failed to show that he was denied an interest in "liberty or property."

-----Footnotes-----

n16 [HN70] When a trial court's decision to dismiss one of the counts was predicated on evidence outside the complaint, we recognize that the court actually granted summary judgment. See Md. Rule 2-322(c); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 783, 614 A.2d 1021 (1992), cert. denied, 330 Md. 319, 624 A.2d 490 (1993). [HN71] The existence of a factual dispute material to determining the liability of th

-----End Footnotes-----

142 Md. App. 327, *; 790 A.2d 83, **;
2002 Md. App. LEXIS 16, ***

[***104] To the extent that Chinwuba is complaining that he was denied a contested case hearing to challenge the allegations in the proposed report, we previously resolved [**124] that issue. We held in *PrimeHealth Corp. v. Ins. Comm'r*, 133 Md. App. 375, 758 A.2d 539 (2000), that Chinwuba did not have right to a hearing on the proposed report.

Chinwuba essentially seeks to "upgrade" his defamation and false light counts into a due process claim. As "a person aggrieved by an act of...the Commissioner," Chinwuba had the right to object to any of Larsen's improper public statements by submitting a written request for a hearing, specifying the subject of his complaint.

JUDGMENT IN FAVOR OF APPELLEE MARYLAND INSURANCE ADMINISTRATION AFFIRMED.
REMAINING JUDGMENTS IN FAVOR OF LARSEN ON COUNTS I (DEFATION) AND II (FALSE LIGHT)
VACATED, AND CASE REMANDED FOR FURTHER PROCEEDINGS ON THOSE CLAIMS,
[*398]CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 1/2 BY APPELLANT, 1/2 BY APPELLEE
LARSEN.

CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA v. MYERS
No. 81-1251

SUPREME COURT OF THE UNITED STATES

461 U.S. 138; 103 S. Ct. 1684; 75 L. Ed. 2d 708; 1983 U.S.LEXIS 153; 51 U.S.L.W. 4436; 1 BNA IER CAS 178

November 8, 1982, Argued
April 20, 1983, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 654 F.2d 719, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee contended that defendant employer wrongfully terminated her because she exercised her right of free speech. The United States Court of Appeals for the Fifth Circuit affirmed an order reinstating the employee. The employer sought review by certiorari.

OVERVIEW: After an employee was notified that she was being transferred, she distributed a questionnaire to staff members. Her supervisor told her she was being terminated because she refused to accept the transfer. The court held that the employee's discharge did not offend the First Amendment. The questionnaire was an employee grievance concerning internal office policy. The questions posed in the survey were not matters of public concern. The purpose of the questionnaire was to precipitate a vote of no confidence in the supervisor. The functioning of the supervisor's office was endangered, because the employee exercised her rights to speech at the office. The limited First Amendment interest involved in the case did not require the supervisor to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.

OUTCOME: The judgment affirming an order that reinstated an employee was reversed.

CORE TERMS: questionnaire, First Amendment, public concern, morale, matters of public concern, supervisor, public employee, public employees, matter of public concern, confidence, matters of public, campaigns, duty, district attorneys, distributed, teacher, pressured, discipline, interfered, candidates, promoting, grievance committee, invasion of privacy, public affairs, healthy, functioning, commenting, balancing, public interest, personnel

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Appeals: U.S. Supreme Court Review

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN1] A state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. The United States Supreme Court's task is to seek a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN2] The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

[HN3] Speech concerning public affairs is more than self-expression, it is the essence of self-government. Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN4] First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Governments: Federal Government: Employees & Officials

[HN5] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps a government employer's dismissal of a worker may not be fair, but ordinary dismissals from government service that violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN6] The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with smaller ones, are guarded.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN7] When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. The court's responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN8] Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN9] Official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. In addition, there is a demonstrated interest in the country that government service should depend upon meritorious performance rather than political service.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Governments: Federal Government: Employees & Officials

[HN10] The state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN11] The Constitution imposes upon the United States Supreme Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, the United States Supreme Court is compelled to examine for itself the statements in issue and the circumstances under which they are made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. Because of this obligation, it cannot avoid making an independent constitutional judgment on the facts of a case.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

461 U.S. 138, *, 103 S. Ct. 1684, **,
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

Governments: Federal Government: Employees & Officials

[HN12] The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Fundamental Freedoms: Time, Place & Manner Restrictions

[HN13] When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN14] Because of the enormous variety of fact situations in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, the United States Supreme Court does not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

DECISION: Discharge of state government employee for distributing questionnaire concerning internal office affairs, held not violative of First Amendment.

SUMMARY: An employee was employed as an Assistant District Attorney for 5 1/2 years, serving at the pleasure of the District Attorney. During this period the employee competently performed her responsibilities of trying criminal cases. The employer was then informed that she would be transferred to prosecute cases in a different section of criminal court, which transfer she strongly opposed. She expressed her opposition to several of her supervisors, including the District Attorney. Despite her objections, she was notified that she was being transferred. The employee then prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. She then distributed the questionnaire to 15 assistant district attorneys. The District Attorney ordered her to be terminated because of her refusal to accept the transfer and also told her that distribution of the questionnaire was considered an act of insubordination. The employee filed suit under 42 USCS 1983, contending that her employment was wrongfully terminated because she had exercised a constitutionally-protected right of free speech. The United States District Court for the Eastern District of Louisiana agreed, ordered the employee reinstated, and awarded backpay, damages, and attorney's fees, finding that the questionnaire was the real reason for the employee's termination and holding that the questionnaire involved matters of public concern and that the state had not clearly demonstrated that the survey substantially interfered with the operations of the District Attorney's office (507 F Supp 752). The United States Court of Appeals for the Fifth Circuit affirmed on the basis of the District Court's opinion (654 F2d 719).

On certiorari, the United States Supreme Court reversed. In an opinion by White, J., joined by Burger, Ch. J., and Powell, Rehnquist, and O'Connor, JJ., it was held that the discharge did not offend the First Amendment since (1) when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior and here, except for one question regarding pressure upon employees to work in political campaigns, the questions posed were not matters of public concern, (2) the District Court erred in imposing an unduly onerous burden on the state to justify the employee's discharge by requiring it to clearly demonstrate that the speech involved substantially interfered with the operation of the office, and (3) the limited First Amendment interest involved here did not require the employer to tolerate action that he reasonably believed would disrupt the office, undermine his authority and destroy the close working relationships within the office.

Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissented, expressing the view that speech about the manner in which the government is operated or should be operated is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment, and because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's office or interfere with the employee's working relationship with her fellow employees, her dismissal violated the First Amendment.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

freedom of speech -- dismissal of public employee -- distribution of questionnaire concerning internal affairs --

Headnote:

The discharge of a public employee for circulating a questionnaire concerning internal office affairs to other employees does not offend the First Amendment since (1) when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior, and the questions in the questionnaire in this case, with but one exception, did not fall under the rubric of matters of public concern, (2) a federal District Court erred in imposing an unduly onerous burden on a state to justify its employee's discharge by requiring it to clearly demonstrate that the speech involved substantially interfered with the operation of the office where the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression, and (3) the limited First Amendment interest involved does not require that the supervisor tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

[***HN2]

public employment -- interest in freedom of expression --

Headnote:

A state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.

[***HN3]

dismissal of public employee -- balance of interests --

Headnote:

The task of a court in determining whether the dismissal of a public employee for his comments on matters of public interest is violative of the First Amendment is to seek a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

[***HN4]

invasion of privacy -- public concern --

Headnote:

The question of whether expression is of kind that is of legitimate concern to the public is the standard in determining whether a common-law action for invasion of privacy is present.

[***HN5]

freedom of speech -- right to participate in political affairs --

Headnote:

The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery since the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people and speech concerning public affairs is more than self-expression, it is the essence of self-government.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

[***HN6]

freedom of speech and assembly -- object of communication --

Headnote:

The First Amendment does not protect speech and assembly only to the extent it can be characterized as political; great secular causes, with smaller ones, are guarded.

[***HN7]

speech on private matters -- employee's criticism of employer --

Headnote:

Speech on private matters does not fall into one of the narrow and well-defined classes of expression which carry so little social value, such as obscenity, that the state can prohibit and punish its expression by all persons in its jurisdiction; for example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.

[***HN8]

protected status of speech -- question of law --

Headnote:

The inquiry into the protected status of speech is one of law, not fact; thus, on review of a decision of a federal District Court's determination of such an issue, the United States Supreme Court is not bound to the views of the District Court under the clearly erroneous standard.

[***HN9]

public concern -- government employee's questionnaire --

Headnote:

Questions in a public employee's questionnaire to other employees pertaining to the confidence and trust that the employee's co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee do not fall under the rubric of matters of public concern since these questions are not of public import in evaluating the performance of the District Attorney, the employee's employer, as an elected official since the employee did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases nor did she seek to bring to light actual or potential wrongdoing or breach of public trust on the part of her employer and others; while discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of the questions was not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

[***HN10]

public concern -- right to protest racial discrimination --

Headnote:

A public employee's right to protest racial discrimination--a matter inherently of public concern--is not forfeited by the employee's choice of a private forum.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

[***HN11]

First Amendment -- round table for employee complaints --

Headnote:

The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

[***HN12]

public concern -- political activities --

Headnote:

A question in a questionnaire sent by a public employee to other employees discussing the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal since official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights and there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service.

[***HN13]

authority to interpret Constitution -- First Amendment --

Headnote:

The Constitution has imposed upon the Supreme Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues and the court is compelled to examine for itself the statements in issue and the circumstances under which they are made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the due process clause of the Fourteenth Amendment, protect; because of this obligation the court cannot avoid making an independent constitutional judgment on the facts of a case.

[***HN14]

dismissal of public employee -- balance of interests --

Headnote:

The balancing of interests to determine whether the dismissal of a public employee for statements she made is violative of the First Amendment requires full consideration of the government's interest in the effective and efficient fulfillment of the responsibilities to the public; the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.

[***HN15]

disruption of office -- ability to perform responsibilities --

Headnote:

Even though there is no demonstration that a questionnaire a public employee sent to other employees impeded the employee's ability to perform her responsibilities, it is important to the efficient and successful operation of a District Attorney's office for assistants to maintain close working relationships with their superiors, and when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

appropriate; it is not necessary for the employer to allow events to unfold to the extent that the disruption of the office and destruction of working relationships is manifest before taking action, however, a stronger showing may be necessary if the employee's speech more substantially involves matters of public concern.

[***HN16]

questionnaire -- disruption of office --

Headnote:

A question on a questionnaire given by one public employee to others, which asks whether or not the other employees have confidence in and relied on the word of five named supervisors, is a statement that carries a clear potential for undermining office relations since questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to precipitate a vote of no confidence in a District Attorney and his supervisors; such a question may provide grounds for the District Attorney to dismiss the employee in an effort to maintain the close working relationships essential to fulfilling public responsibilities.

[***HN17]

manner of distribution of questionnaire -- protected expression --

Headnote:

The manner, time, and place in which a questionnaire was distributed by a public employee to other employees is relevant to the determination of whether that employee may be dismissed for distributing the questionnaire without that dismissal being violative of the First Amendment, since private expression may in some situations bring additional factors to the balancing of interests required to make the determination of whether the action was protected by the First Amendment; when a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered and although some latitude in when official work is performed is to be allowed when professional employees are involved, and the employee who distributed the questionnaire did not violate announced office policy, the fact that the employee exercised her rights to speech at the office supports the supervisor's fears that the functioning of his office was in danger.

[***HN18]

balance of interest -- employee speech -- employee's own time --

Headnote:

Employee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the calculation of the balancing of interests to determine whether a public employee may be discharged for statements made relating to the office, and might lead to a different conclusion than where the speech transpires in part during the work day and in work areas of the office.

[***HN19]

employee's speech -- violation of office policy --

Headnote:

The violation of a rule of office policy by a public employee by speaking on issues of office work would strengthen the position of the supervisor in asserting that he may dismiss the employee without violating the employee's right to free speech under the First Amendment.

[***HN20]

employee's speech -- arising from employment dispute --

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

Headnote:

When employee's speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office; although the employee's reluctance to accede to a transfer order is not a sufficient cause in itself for her dismissal, this does not render irrelevant the fact the questionnaire the employee distributed to other employees emerged after a persistent dispute between the employee and her supervisor and his deputies over office transfer policy.

[***HN21]

employee's speech -- general standards --

Headnote:

It is neither appropriate nor feasible to lay down a general standard against which all public employee statements may be judged to determine whether dismissal for the statements is violative of the First Amendment because of the enormous variety of fact situations in which critical statements by public employee may be thought by their superiors to furnish grounds for dismissal.

[***HN22]

First Amendment -- primary aim --

Headnote:

The First Amendment's primary aim is the full protection of speech upon issues of public concern.

SYLLABUS: Respondent was employed as an Assistant District Attorney in New Orleans with the responsibility of trying criminal cases. When petitioner District Attorney proposed to transfer respondent to prosecute cases in a different section of the criminal court, she strongly opposed the transfer, expressing her view to several of her supervisors, including petitioner. Shortly thereafter, she prepared a questionnaire that she distributed to the other Assistant District Attorneys in the office concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Petitioner then informed respondent that she was being terminated for refusal to accept the transfer, and also told her that her distribution of the questionnaire was considered an act of insubordination. Respondent filed suit in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. V), alleging that she was wrongfully discharged because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered her reinstated, and awarded backpay, damages, and attorney's fees. Finding that the questionnaire, not the refusal to accept the transfer, was the real reason for respondent's termination, the court held that the questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the questionnaire interfered with the operation of the District Attorney's office. The Court of Appeals affirmed.

Held: Respondent's discharge did not offend the First Amendment. Pp. 142-154.

(a) In determining a public employee's rights of free speech, the problem is to arrive "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568. P. 142.

(b) When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Here, except for the question in respondent's questionnaire regarding pressure upon employees to work in political campaigns, the questions posed do not fall under the rubric of matters of "public concern." Pp. 143-149.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

(c) The District Court erred in imposing an unduly onerous burden on the State to justify respondent's discharge by requiring it to "clearly demonstrate" that the speech involved "substantially interfered" with the operation of the office. The State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Pp. 149-150.

(d) The limited First Amendment interest involved here did not require petitioner to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office. The question on the questionnaire regarding the level of confidence in supervisors was a statement that carried the clear potential for undermining office relations. Also, the fact that respondent exercised her rights to speech at the office supports petitioner's fears that the function of his office was endangered. And the fact that the questionnaire emerged immediately after a dispute between respondent and petitioner and his deputies, requires that additional weight be given to petitioner's view that respondent threatened his authority to run the office. Pp. 150-154.

COUNSEL: William F. Wessel argued the cause for petitioner. With him on the brief was Victoria Lennox Bartels.

George M. Strickler, Jr., argued the cause for respondent. With him on the brief were Ann Woolhandler and Michael G. Collins. *

* Briefs of amici curiae urging affirmance were filed by Mark C. Rosenblum, Nadine Strossen, and Charles S. Sims for the American Civil Liberties Union et al.; and by Robert H. Chanin, Laurence Gold, and Marsha S. Berzon for the National Education Association et al.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, post, p. 156.

OPINIONBY: WHITE

OPINION: [*140] [***715] [**1686] JUSTICE WHITE delivered the opinion of the Court.

[***HR1A] In *Pickering v. Board of Education*, 391 U.S. 563 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.*, at 568. The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer n1 and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was [***716] notified that she was being transferred. [*141]Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were [**1687] discussed and Myers later testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do some research on the matter.

461 U.S. 138, *, 103 S. Ct. 1684, **,
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

-----Footnotes-----

n1 Myers' opposition was at least partially attributable to her concern that a conflict of interest would have been created by the transfer because of her participation in a counseling program for convicted defendants released on probation in the section of the criminal court to which she was to be assigned.

-----End Footnotes-----

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. n2 Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

-----Footnotes-----

n2 The questionnaire is reproduced as an Appendix to this opinion.

-----End Footnotes-----

Myers filed suit under 42 U. S. C. § 1983 (1976 ed., Supp. V), contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and [*142] attorney's fees. 507 F.Supp. 752 (ED La. 1981). n3 The District Court found that although Connick informed Myers that she was being fired because of her refusal to accept a transfer, the facts showed that the questionnaire was the real reason for her termination. The court then proceeded to hold that Myers' questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.

-----Footnotes-----

n3 Petitioner has also objected to the assessment of damages as being in violation of the Eleventh Amendment and to the award of attorney's fees. Because of our disposition of the case, we do not reach these questions.

-----End Footnotes-----

Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed on the basis of the District Court's opinion. 654 F.2d 719 (1981). Connick then sought review in this Court by way of certiorari, which we granted. 455 U.S. 999 (1982).

II

[***HR2] [***HR3] For at least 15 years, it has been settled that [HN1] a State cannot condition public employment on a basis [***717] that infringes the employee's constitutionally protected interest in freedom of expression. Keyishian v.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

Board of Regents, 385 U.S. 589, 605-606 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Branti v. Finkel, 445 U.S. 507, 515-516 (1980). Our task, as we defined it in Pickering, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S., at 568. The District Court, and thus the Court of Appeals as well, misapplied our decision in Pickering and consequently, in our view, erred in striking the balance for respondent.

[*143] [**1688] A

[***HR4A] The District Court got off on the wrong foot in this case by initially finding that, "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." 507 F.Supp., at 758. Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in Pickering. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, n4 reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter. n5

-----Footnotes-----

n4 See Perry v. Sindermann, 408 U.S. 593, 598 (1972); Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 284 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414 (1979).

n5 [HN2] The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See Restatement (Second) of Torts § 652D (1977). See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject matter of the publicity is matter of public record); Time, Inc. v. Hill, 385 U.S. 374, 387-388 (1967).

-----End Footnotes-----

[***HR4B]

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment -- including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "[A policeman] may have a constitutional [*144] right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N. E. 517, 517 (1892). For many years, Holmes' epigram expressed [***718] this Court's law. Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Los Angeles Bd. of Public Works, 341 U.S. 716 (1951); Public Workers v. Mitchell, 330 U.S. 75 (1947); United States v. Wurzbach, 280 U.S. 396 (1930); Ex parte Curtis, 106 U.S. 371 (1882).

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated. In Wiemann v. Updegraff, 344 U.S. 183 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), the Court recognized that the government could not deny

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

employment because of previous membership in a particular party. See also *Shelton v. Tucker*, 364 U.S. 479, 490 (1960); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). By the time *Sherbert v. Verner*, 374 U.S. 398 (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." [**1689] *Id.*, at 404. It was therefore no surprise when in *Keyishian v. Board of Regents*, *supra*, the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. *Id.*, at 605-606.

[***HR5] In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public [*145] affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). [HN3] "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is [***719] entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

Pickering v. Board of Education, *supra*, followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. *Pickering's* subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decisionmaking by the electorate." 391 U.S. at 571-572.

Our cases following *Pickering* also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann*, 408 U.S. 593 (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas Legislature and had become involved in public disagreement over whether the college should be elevated to 4-year status -- a change opposed by the Regents. In *Mt. Healthy City Board of Ed. v. [146]Doyle*, 429 U.S. 274 (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), we held that [HN4] First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern.

[**1690]

[***HR1B] *Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. n6 [HN5] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service [***720] which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. [*147] *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, *supra*; *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

-----Footnotes-----

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

n6 See, *Clark v. Holmes*, 474 F.2d 928 (CA7 1972), cert. denied, 411 U.S. 972 (1973); *Schmidt v. Fremont County School Dist.*, 558 F.2d 982, 984 (CA10 1977).

-----End Footnotes-----

***HR6] ***HR7] We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. [HN6] "[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 223 (1967), quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth v. United States*, supra; *New York v. Ferber*, 458 U.S. 747 (1982). For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that [HN7] when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. *Bishop v. Wood*, supra, at 349-350. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

HR8A] ***HR9A] ***HR10A] [HN8] Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context [*148] of a given statement, as revealed by the whole record. n7 In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section [721] of the criminal court. Unlike the dissent, post, at 163, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging [**1691] its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre. n8

***HR8B]

-----Footnotes-----

n7 The inquiry into the protected status of speech is one of law, not fact. See n. 10, *infra*.

***HR9B] ***HR10B]

n8 This is not a case like *Givhan*, where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately. Mrs. Givhan's right to protest racial discrimination -- a matter inherently of public concern -- is not forfeited by her choice of a private forum. 439 U.S., at 415-416. Here,

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

however, a questionnaire not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. The dissent's analysis of whether discussions of office morale and discipline could be matters of public concern is beside the point -- it does not answer whether this questionnaire is such speech.

-----End Footnotes-----

[*149]

[***HR11] To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

[***HR12] One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that [HN9] official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. *Branti v. Finkel*, 445 U.S., at 515-516; *Elrod v. Burns*, 427 U.S. 347 (1976). In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Public Workers v. Mitchell*, 330 U.S. 75 (1947). Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that [***722] public employees be able to speak out freely without fear of retaliatory dismissal.

B

[***HR13A] Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. Here the District Court again erred in imposing an unduly onerous burden on the State to justify [*150]Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet Pickering unmistakably states, and respondent agrees, n9 [**1692] that [HN10] the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests. n10

-----Footnotes-----

n9 See Brief for Respondent 9 ("These factors, including the degree of the 'importance' of plaintiff's speech, were proper considerations to be weighed in the Pickering balance"); Tr. of Oral Arg. 30 (counsel for respondent) ("I certainly would not disagree that the content of the questionnaire, whether it affects a matter of great public concern or only a very narrow internal matter, is a relevant circumstance to be weighed in the Pickering analysis").

[***HR13B]

n10 [HN11] "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (footnote omitted).

Because of this obligation, we cannot "avoid making an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (opinion of BRENNAN, J.). See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-916, n. 50 (1982).

-----End Footnotes-----

C

[**HR14] The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "[promoting] [*151] efficiency and integrity in the discharge of official duties, and [in] [maintaining] proper discipline in the public service." *Ex parte Curtis*, 106 U.S., at 373. As JUSTICE POWELL explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974):

"To this end, [HN12] the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately [***723] impair the efficiency of an office or agency."

[**HR15] We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." 507 F.Supp., at 759. Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. n11 When close working relationships are essential to fulfilling public [*152] responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. n12 We caution that a stronger [**1693] showing may be necessary if the employee's speech more substantially involved matters of public concern.

-----Footnotes-----

n11 Waldron testified that from what he had learned of the events on October 7, Myers "was trying to stir up other people not to accept the changes [transfers] that had been made on the memorandum and that were to be implemented." App. 167. In his view, the questionnaire was a "final act of defiance" and that, as a result of Myers' action, "there were going to be some severe problems about the changes." *Ibid.* Connick testified that he reached a similar conclusion after conducting his own investigation. "After I satisfied myself that not only wasn't she accepting the transfer, but that she was affirmatively opposing it and disrupting the routine of the office by this questionnaire. I called her in . . . [and dismissed her]." *Id.*, at 130.

461 U.S. 138, *, 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

n12 Cf. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 52, n. 12 (1983) (proof of future disruption not necessary to justify denial of access to nonpublic forum on grounds that the proposed use may disrupt the property's intended function); *Greer v. Spock*, 424 U.S. 828 (1976) (same).

-----End Footnotes-----

[***HR16] The District Court rejected Connick's position because "[unlike] a statement of fact which might be deemed critical of one's superiors, [Myers'] questionnaire was not a statement of fact but the presentation and solicitation of ideas and opinions," which are entitled to greater constitutional protection because "under the First Amendment there is no such thing as a false idea." Ibid. This approach, while perhaps relevant in weighing the value of Myers' speech, bears no logical relationship to the issue of whether the questionnaire undermined office relationships. Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

[***HR17] [***HR18A] [***HR19A] Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in *Givhan v. Western Line Consolidated School District*, 439 U.S., at 415, n. 4: [***724] "Private expression . . . may in some situations bring additional [*153] factors to the Pickering calculus. [HN13] When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Here the questionnaire was prepared and distributed at the office; the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed. n13 Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy, n14 the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.

[***HR18B]

-----Footnotes-----

n13 The record indicates that some, though not all, of the copies of the questionnaire were distributed during lunch. Employee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the Pickering calculus, and might lead to a different conclusion. Cf. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

[***HR19B]

n14 The violation of such a rule would strengthen Connick's position. See *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S., at 284.

-----End Footnotes-----

[***HR20] Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under *Mt. Healthy* [*154] *City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy.

III

HR1C] ***HR21] Myers' questionnaire touched upon matters of public concern in only a most limited [**1694] sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. We reiterate, however, the caveat we expressed in *Pickering*, 391 U.S., at 569: [HN14] "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not [725] deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

***HR22] Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here. The judgment of the Court of Appeals is

Reversed.

[*155] APPENDIX TO OPINION OF THE COURT

Questionnaire distributed by respondent on October 7, 1980.

PLAINTIFF'S EXHIBIT 2, App. 191

"PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARANTEED.

1. How long have you been in the Office?
2. Were you moved as a result of the recent transfers?
3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted?
4. Do you think as a matter of policy, they should have been?
5. From your experience, do you feel office procedure regarding transfers has been fair?
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects [sic] overall working performance of A.D.A. personnel?
8. If so, how do you think it effects [sic] office morale?
9. Do you generally first learn of office changes and developments through rumor?

461 U.S. 138, *, 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

10. Do you have confidence in and would you rely on the word of:

Bridget Bane_

Fred Harper_

Lindsay Larson_

Joe Meyer_

Dennis Waldron_

11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?_

12. Do you feel a grievance committee would be a worthwhile addition to the office structure?_

[*156] 13. How would you rate office morale?_

14. Please feel free to express any comments or feelings you have._

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY."

DISSENTBY: BRENNAN

DISSENT: [***726] [*1695] JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Sheila Myers was discharged for circulating a questionnaire to her fellow Assistant District Attorneys seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office. The Court concludes that her dismissal does not violate the First Amendment, primarily because the questionnaire addresses matters that, in the Court's view, are not of public concern. It is hornbook law, however, that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees, I dissent.

I

The Court correctly reaffirms the long-established principle that the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment. E. g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). *Pickering* held that the First Amendment protects the rights of public employees "as citizens to comment on matters of public interest" in connection with the operation of the government agencies for which they work. 391 U.S., at 568. We recognized, however, that the [*157] government has legitimate interests in regulating the speech of its employees that differ significantly from its interests in regulating the speech of people generally. *Ibid.* We therefore held that the scope of public employees' First Amendment rights must be determined by balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the government's interests as an employer. When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public. See *id.*, at 574. Thus, whether a public employee's speech addresses a matter of public concern is relevant to the

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

constitutional inquiry only when the statements at issue -- by virtue of their content or the context in which they were made -- may have an adverse impact on the government's [***727] ability to perform its duties efficiently. n1

-----Footnotes-----

n1 Although the Court's opinion states that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge," ante, at 146 (footnote omitted), I do not understand it to imply that a governmental employee's First Amendment rights outside the employment context are limited to speech on matters of public concern. To the extent that the Court's opinion may be read to suggest that the dismissal of a public employee for speech unrelated to a subject of public interest does not implicate First Amendment interests, I disagree, because our cases establish that public employees enjoy the full range of First Amendment rights guaranteed to members of the general public. Under the balancing test articulated in Pickering, however, the government's burden to justify such a dismissal may be lighter. See n. 4, *infra*.

-----End Footnotes-----

The Court's decision today is flawed in three respects. First, the Court distorts the balancing analysis required under Pickering by suggesting that one factor, the [**1696] context in which a statement is made, is to be weighed twice -- first in [*158] determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer. See ante, at 147-148, 152-153. Second, in concluding that the effect of respondent's personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. See ante, at 148-149. Third, the Court misapplies the Pickering balancing test in holding that Myers could constitutionally be dismissed for circulating a questionnaire addressed to at least one subject that was "a matter of interest to the community," ante, at 149, in the absence of evidence that her conduct disrupted the efficient functioning of the District Attorney's Office.

II

The District Court summarized the contents of respondent's questionnaire as follows:

"Plaintiff solicited the views of her fellow Assistant District Attorneys on a number of issues, including office transfer policies and the manner in which information of that nature was communicated within the office. The questionnaire also sought to determine the views of Assistants regarding office morale, the need for a grievance committee, and the level of confidence felt by the Assistants for their supervisors. Finally, the questionnaire inquired as to whether the Assistants felt pressured to work in political campaigns on behalf of office-supported candidates." 507 F.Supp. 752, 758 (ED La. 1981).

After reviewing the evidence, the District Court found that "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." *Ibid.* The Court of Appeals affirmed on the basis of [*159] the District Court's findings and conclusions. 654 F.2d 719 (CA5 1981). The Court nonetheless concludes that Myers' questions about the effect of petitioner's personnel policies on employee morale [***728] and overall work performance are not "of public import in evaluating the performance of the District Attorney as an elected official." Ante, at 148. In so doing, it announces the following standard: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement" Ante, at 147-148.

The standard announced by the Court suggests that the manner and context in which a statement is made must be weighed on both sides of the Pickering balance. It is beyond dispute that how and where a public employee expresses his views are relevant in the second half of the Pickering inquiry -- determining whether the employee's speech adversely affects the government's interests as an employer. The Court explicitly acknowledged this in *Givhan v. Western Line*

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

Consolidated School District, 439 U.S. 410 (1979), where we stated that when a public employee speaks privately to a supervisor, "the employing agency's institutional efficiency may be threatened not only by the content of the . . . message but also by the manner, time, and place in which it is delivered." *Id.*, at 415, n. 4. But the fact that a public employee has chosen to express his views in private has nothing whatsoever to do with the first half of the Pickering calculus -- whether those views relate to a matter of public concern. This conclusion is implicit in Givhan's holding that the freedom of speech guaranteed by the First Amendment is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." 439 U.S., at 415-416.

The Court seeks to distinguish Givhan on the ground that speech protesting racial [**1697] discrimination is "inherently of public concern." *Ante*, at 148, n. 8. In so doing, it suggests that there are two classes of speech of public concern: statements "of public import" because of their content, form, and context, [*160] and statements that, by virtue of their subject matter, are "inherently of public concern." In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why. The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed -- regardless of whether it actually becomes the subject of a public controversy. n2

-----Footnotes-----

n2 Although the parties offered no evidence on whether the subjects addressed by the questionnaire were, in fact, matters of public concern, extensive local press coverage shows that the issues involved are of interest to the people of Orleans Parish. Shortly after the District Court took the case under advisement, a major daily newspaper in New Orleans carried a 7-paragraph story describing the questionnaire, the events leading to Myers' dismissal, and the filing of this action. The Times-Picayune/The States-Item, Dec. 6, 1980, section 1, p. 21, col. 1. The same newspaper also carried a 16-paragraph story when the District Court ruled in Myers' favor, Feb. 11, 1981, section 1, p. 15, col. 2; a 14-paragraph story when the Court of Appeals affirmed the District Court's decision, July 28, 1981, section 1, p. 11, col. 1; a 12-paragraph story when this Court granted Connick's petition for certiorari, Mar. 9, 1982, section 1, p. 15, col. 5.; and a 17-paragraph story when we heard oral argument, Nov. 9, 1982, section 1, p. 13, col. 5.

In addition, matters affecting the internal operations of the Orleans Parish District Attorney's Office often receive extensive coverage in the same newspaper. For example, The Times-Picayune/The States-Item carried a lengthy story reporting that the agency moved to "plush new offices," and describing in detail the "privacy problem" faced by Assistant District Attorneys because the office was unable to obtain modular furniture with which to partition its new space. Jan. 25, 1981, section 8, p. 13, col. 1. It also carried a 16-paragraph story when a committee of the Louisiana State Senate voted to prohibit petitioner from retaining a public relations specialist. July 9, 1982, section 1, p. 14, col. 1.

In light of the public's interest in the operations of the District Attorney's Office in general, and in the dispute between the parties in particular, it is quite possible that, contrary to the Court's view, *ante*, at 148-149, Myers' comments concerning morale and working conditions in the office would actually have engaged the public's attention had she stated them publicly. Moreover, as a general matter, the media frequently carry news stories reporting that personnel policies in effect at a government agency have resulted in declining employee morale and deteriorating agency performance.

-----End Footnotes-----

[***729] "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. [**161] Louisiana*, 379 U.S. 64, 74-75 (1964). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

We have long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government. *Mills v. Alabama*, 384 U.S., at 218-219; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). See A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 22-27 (1948). "No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

free and open debate to consider and resolve their own destiny." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (POWELL, J., dissenting).

Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government.

"Whatever differences may exist about interpretations of the First Amendment, [**1698] there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, supra, at 218-219 (emphasis added).

[*162] The constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements expressing criticism of governmental officials. In *New York Times Co. v. Sullivan*, [***730]supra, we held that the Constitution prohibits an award of damages in a libel action brought by a public official for criticism of his official conduct absent a showing that the false statements at issue were made with "actual malice." 376 U.S., at 279-280. We stated there that the First Amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*, at 270. See *Garrison v. Louisiana*, supra, at 76.

In *Pickering* we held that the First Amendment affords similar protection to critical statements by a public school teacher directed at the Board of Education for whom he worked. 391 U.S., at 574. In so doing, we recognized that "free and open debate" about the operation of public schools "is vital to informed decision-making by the electorate." *Id.*, at 571-572. We also acknowledged the importance of allowing teachers to speak out on school matters.

"Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.*, at 572.

See also *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (MARSHALL, J., dissenting) (describing "[the] importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors . . .").

[*163] Applying these principles, I would hold that Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities. The questionnaire sought primarily to obtain information about the impact of the recent transfers on morale in the District Attorney's Office. It is beyond doubt that personnel decisions that adversely affect discipline and morale may ultimately impair an agency's efficient performance of its duties. See *Arnett v. Kennedy*, supra, at 168 (opinion of POWELL, J.). Because I believe the First Amendment protects the right of public employees to discuss such matters so that the public may be better informed about how their elected officials fulfill their responsibilities, I would affirm the District Court's conclusion that the questionnaire related to matters of public importance and concern.

The Court's adoption of a far narrower conception of what subjects are of public concern seems prompted by its fears that a broader view "would mean that virtually every [***731] remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case." *Ante*, at 149. Obviously, not every remark directed at a public official by a public employee is protected by the First [**1699] Amendment. n3 But deciding whether a particular matter is of public concern is an inquiry that, by its very nature, is a sensitive one for judges charged with interpreting a constitutional provision intended to put "the decision as to what views shall be [*164] voiced largely into

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

the hands of each of us" *Cohen v. California*, 403 U.S. 15, 24 (1971).ⁿ⁴ The Court recognized the sensitive nature of this determination in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that the scope of the constitutional privilege in defamation cases turns on whether or not the plaintiff is a public figure, not on whether the statements at issue address a subject of public concern. In so doing, the Court referred to the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not," and expressed "doubt [about] the wisdom of committing this task to the conscience of judges." *Id.*, at 346. See also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (MARSHALL, J., dissenting). In making such a delicate inquiry, we must bear in mind that "the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

-----Footnotes-----

ⁿ³ Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

ⁿ⁴ Indeed, it has been suggested that "a classification that bases the right to First Amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the whole idea of the First Amendment." T. Emerson, *The System of Freedom of Expression* 554 (1970). The degree to which speech is of interest to the public may be relevant in determining whether a public employer may constitutionally be required to tolerate some degree of disruption resulting from its utterance. See *ante*, at 152. In general, however, whether a government employee's speech is of "public concern" must be determined by reference to the broad conception of the First Amendment's guarantee of freedom of speech found necessary by the Framers

"to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (footnote omitted).

See *Wood v. Georgia*, 370 U.S. 375, 388 (1962).

-----End Footnotes-----

The Court's decision ignores these precepts. Based on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning [*165] employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness. The proper means to ensure that the [***732] courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end. See Part III, *infra*.ⁿ⁵

-----Footnotes-----

ⁿ⁵ The Court's narrow conception of which matters are of public interest is also inconsistent with the broad view of that concept articulated in our cases dealing with the constitutional limits on liability for invasion of privacy. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), we held that a defendant may not constitutionally be held liable for an invasion of

461 U.S. 138, *, 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

privacy resulting from the publication of a false or misleading report of "matters of public interest" in the absence of proof that the report was published with knowledge of its falsity or reckless disregard for its truth. *Id.*, at 389-391. In that action, Hill had sought damages resulting from the publication of an allegedly false report that a new play portrayed the experience of him and his family when they were held hostage in their home in a publicized incident years earlier. We entertained "no doubt that . . . the opening of a new play linked to an actual incident, is a matter of public interest." *Id.*, at 388. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that a radio station could not constitutionally be held liable for broadcasting the name of a rape victim, because the victim's name was contained in public records). Our discussion in *Time, Inc. v. Hill* of the breadth of the First Amendment's protections is directly relevant here:

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. . . . 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Bridges v. California*, 314 U.S. 252, 269." 385 U.S., at 388.

The quoted passage makes clear that, contrary to the Court's view, *ante*, at 143, n. 5, the subjects touched upon in respondent's questionnaire fall within the broad conception of "matters of public interest" that defines the scope of the constitutional privilege in invasion of privacy cases. See Restatement (Second) of Torts § 652D, Comment j (1977):

"The scope of a matter of legitimate concern to the public is not limited to 'news,' in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."

-----End Footnotes-----
[*166] [**1700] III

Although the Court finds most of Myers' questionnaire unrelated to matters of public interest, it does hold that one question -- asking whether Assistants felt pressured to work in political campaigns on behalf of office-supported candidates -- addressed a matter of public importance and concern. The Court also recognizes that this determination of public interest must weigh heavily in the balancing of competing interests required by *Pickering*. Having gone that far, however, the Court misapplies the *Pickering* test and holds -- against our previous authorities -- that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears [***733] are essentially unfounded.

Pickering recognized the difficulty of articulating "a general standard against which all . . . statements may be judged," 391 U.S., at 569; it did, however, identify a number of factors that may affect the balance in particular cases. Those relevant here are whether the statements are directed to persons with whom the speaker "would normally be in contact in the course of his daily work"; whether they had an adverse effect on "discipline by immediate superiors or harmony among coworkers"; whether the employment relationship in question is "the kind . . . for which it can persuasively [*167] be claimed that personal loyalty and confidence are necessary to their proper functioning"; and whether the statements "have in any way either impeded [the employee's] proper performance of his daily duties . . . or . . . interfered with the regular operation of the [office]." *Id.*, at 568-573. In addition, in *Givhan*, we recognized that when the statements in question are made in private to an employee's immediate supervisor, "the employing agency's institutional efficiency may be threatened not only by the content of the . . . message but also by the manner, time, and place in which it is delivered." 439 U.S., at 415, n. 4. See *supra*, at 159.

The District Court weighed all of the relevant factors identified by our cases. It found that petitioner failed to establish that Myers violated either a duty of confidentiality or an office policy. 507 F.Supp., at 758-759. Noting that most of the copies of the questionnaire were distributed during lunch, it rejected the contention that the distribution of the questionnaire impeded [**1701] Myers' performance of her duties, and it concluded that "Connick has not shown any

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

evidence to indicate that the plaintiff's work performance was adversely affected by her expression." *Id.*, at 754-755, 759 (emphasis supplied).

The Court accepts all of these findings. See *ante*, at 151. It concludes, however, that the District Court failed to give adequate weight to the context in which the questionnaire was distributed and to the need to maintain close working relationships in the District Attorney's Office. In particular, the Court suggests the District Court failed to give sufficient weight to the disruptive potential of Question 10, which asked whether the Assistants had confidence in the word of five named supervisors. *Ante*, at 152. The District Court, however, explicitly recognized that this was petitioner's "most forceful argument"; but after hearing the testimony of four of the five supervisors named in the question, it found that the question had no adverse effect on Myers' relationship with her superiors. 507 F.Supp., at 759.

[*168] To this the Court responds that an employer need not wait until the destruction of working relationships is manifest before taking action. In the face of the District Court's finding that the circulation of the questionnaire had no disruptive effect, the Court holds that respondent may be dismissed because petitioner "reasonably believed [the action] would disrupt the office, undermine his authority, and destroy close working relationships." *Ante*, [***734] at 154. Even though the District Court found that the distribution of the questionnaire did not impair Myers' working relationship with her supervisors, the Court bows to petitioner's judgment because "[when] close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Ante*, at 151-152.

Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the Pickering balance, we must bear in mind that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S., at 574. See *Keyishian v. Board of Regents*, 385 U.S., at 604. If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make their own appraisal of the effects of the speech in question.

In this regard, our decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), is controlling. *Tinker* arose in a public school, a context similar to the one in which the present case arose in that the determination of the scope of the Constitution's guarantee of freedom of speech required consideration of the "special [*169] characteristics of the . . . environment" in which the expression took place. See *id.*, at 506. At issue was whether public high school students could constitutionally be prohibited from wearing black armbands in school to express their opposition to the Vietnam conflict. The District Court had ruled that such a ban "was reasonable because it was based upon [school officials'] fear of a disturbance from the wearing of armbands." *Id.*, at 508. We found that justification inadequate, because "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Ibid*. We concluded:

"In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany [**1702] an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.*, at 509 (emphasis supplied) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (CA5 1966)).

Because the speech at issue addressed [***735] matters of public importance, a similar standard should be applied here. After reviewing the evidence, the District Court found that "it cannot be said that the defendant's interest in promoting the efficiency of the public services performed through his employees was either adversely affected or substantially impeded by plaintiff's distribution of the questionnaire." 507 F.Supp., at 759. Based on these findings the District Court concluded that the circulation of the questionnaire was protected by the First Amendment. The District Court applied the proper legal standard and reached an acceptable accommodation between the competing interests. I would affirm its decision and the judgment of the Court of Appeals.

461 U.S. 138, *; 103 S. Ct. 1684, **;
75 L. Ed. 2d 708, ***; 1983 U.S. LEXIS 153

[*170] IV

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent.

REFERENCES:

16A Am Jur 2d, Constitutional Law 501, 517, 563; 63 Am Jur 2d, Public Officers and Employees 189

20 Am Jur Pl & Pr Forms (Rev), Public Officers and Employees, Forms 81, 87, 88

USCS, Constitution, 1st Amendment

US L Ed Digest, Constitutional Law 934, 940

L Ed Index to Annos, Freedom of Speech, Press, Religion, and Assembly; Officers

ALR Quick Index, Discharge From Employment; Freedom of Speech and Press; Public Officers and Employees

Federal Quick Index, Discharge From Employment; Freedom of Speech and Press; Public Officers and Employees

Annotation References:

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

The Supreme Court and the First Amendment right of association. 33 L Ed 2d 865.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

FRANK M. DIMEGLIO, Plaintiff-Appellee, v. J. ROBERT HAINES, individually and in his former official capacity as Zoning Commissioner of Baltimore County, Maryland, Defendant-Appellant, and ARNOLD M. JABLON, individually and in his official capacity as Director of Zoning Administration and Development Management of Baltimore County, Maryland; ROGER HAYDEN, individually and in his official capacity as Executive of Baltimore County, Maryland; BALTIMORE COUNTY, MARYLAND, a municipal corporation, Defendants.

No. 94-1569

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

45 F.3d 790; 1995 U.S. App. LEXIS 2010

October 31, 1994, Argued
February 2, 1995, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CA-93-2656-Y).

DISPOSITION: VACATED AND REMANDED WITH INSTRUCTIONS

CASE SUMMARY:

PROCEDURAL POSTURE: The United States District Court for the District of Maryland denied defendant zoning commissioner's motion for summary judgment on the claim by plaintiff zoning inspector under the Civil Rights Act of 1871, 42 U.S.C.S. § 1983. Other defendants, the city executive and the county, did not appeal. The commissioner contended that he was entitled to qualified immunity on the § 1983 claim.

OVERVIEW: A commissioner had the responsibility the assignment of zoning inspectors to geographic areas. One inspector made some comments at a citizens' group meeting group. The commissioner reprimanded the inspector for giving legal advice. Subsequently, the inspector was assigned to a different region and alleged that he was reassigned in retaliation for his exercise of free speech. The commissioner asserted that he had qualified immunity. On appeal, the court found that, in deciding qualified immunity claims, the district court had to determine whether the inspector alleged a violation of a constitutional right that was clearly established at the time of the commissioner's actions before the district court proceeded to ancillary issues. The legal reasonableness of the commissioner's actions was to be assessed in light of the legal rules that were clearly established at the time of the action, not current law. The district court should have addressed the qualified immunity question before summary judgment. Because it was not clearly established that the inspector's speech was protected speech, the district court erred in not holding that the commissioner was entitled to qualified immunity.

OUTCOME: The court vacated the judgment that denied summary judgment to the commissioner and remanded the case with instructions to enter a judgment in favor of the commissioner the inspector's civil rights claim. The district court erred in denying the commissioner qualified immunity on the claim. The district court erred when it permitted discovery prior to addressing the threshold question of whether the commissioner was entitled to qualified immunity.

CORE TERMS: qualified immunity, immunity, current law, constitutional right, summary judgment, discovery, zoning, constitutional claim, established law, threshold, retaliation, reasonableness, First Amendment, constitutional rights, particularized, deprivation, speaking, inspector, sentence, interlocutory appeal, established right, applicable law, appropriately, concomitant, entitlement, retaliatory, addressing, reassignment, alteration, immediately appealable

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN1] Government officials are protected by qualified immunity as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Immunity shields officials insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. When a plaintiff seeks to hold an official personally liable for his exercise of a discretionary function, a court must, in addressing the qualified immunity defense, consider whether the plaintiff has alleged a violation of law that was clearly established at the time the challenged actions were taken. The inquiry is a pure question of law and, hence, always capable of decision at the summary judgment stage. Because the question of immunity is essentially a legal question, immunity should be decided by the court long before trial. Even such pretrial matters as discovery are to be avoided if possible, as inquiries of that kind can be peculiarly disruptive of effective government.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN2] Only if a court determines that a plaintiff has alleged a violation of a civil right by a public official, clearly established at the time the actions occurred, should the court proceed to determine whether a reasonable person in the official's position would have known that his actions violated that right. When the inquiry proceeds to this point, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct; however, the defendant may still be able to show extraordinary circumstances and prove that he neither knew nor should have known of the relevant legal standard. Because such a claim turns primarily on objective factors, the determination is a matter of law for the courts.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN3] A district court may deny a motion for summary judgment based on qualified immunity and allow discovery to proceed only if it has addressed the threshold immunity question, and concluded (1) that the plaintiff alleged a violation of a clearly established right, but (2) that there existed a material factual dispute over what actually occurred, and (3) that under the defendant's version, a reasonable official could have believed that his conduct was lawful. Where there is a material dispute over what the defendant did, and whether the defendant violated clearly established law, it may be that the qualified immunity question cannot be resolved without discovery. After discovery and upon a proper motion, the district court may reconsider the question of qualified immunity. If discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts, the defendant is entitled to summary judgment, even though the acts alleged constitute a violation of clearly established rights.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN4] In deciding qualified immunity claims, courts should determine whether the plaintiff has alleged the violation of a constitutional right that was clearly established at the time of the defendant's actions, before the courts proceed to address any ancillary issues.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN5] A court reviewing a qualified immunity defense should assess, before anything else, whether the alleged conduct violated law clearly established at the time the conduct occurred. The term "clearly established" has an acquired meaning referencing qualified immunity, with its focus on law at the time of the challenged conduct.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN6] An immunity inquiry is distinct from both a merits and Fed. R. Civ. P. 12(b)(6) review.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN7] An official's entitlement to qualified immunity does not turn on whether his conduct actually violated the law; rather, it turns on the objective legal reasonableness of his action. However, neither in deciding under Fed. R. Civ. P.

12(b)(6) whether a plaintiff has stated a claim upon which relief can be granted, nor in evaluating the merits of a claim, is the reasonableness of the defendant's actions - the touchstone of qualified immunity - determinative or even relevant.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN8] The legal reasonableness of the actions of a defendant who alleges official immunity is to be assessed in light of the legal rules that were clearly established at the time it was taken, not in light of current law. In both a merits review and a review of a Fed. R. Civ. P. 12(b)(6) review or something akin to it, however, a court generally examines current law. There is no necessary relationship between current and past law such that an inquiry into the former will always inform the inquiry into the latter. A right that exists today may not have existed at the time of the alleged conduct. A right that existed at the time of the conduct may not exist today. This is especially true in the case of statutory rights, which also can give rise to lawsuits against government officials. For these reasons, current law is not, technically, relevant to the defendant's entitlement to qualified immunity.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Civil Procedure: Summary Judgment: Summary Judgment Standard

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN9] That current law has no application to the specific question of qualified immunity is not to say that courts should be foreclosed from conducting an inquiry under Fed. R. Civ. P. 12(b)(6) or a like inquiry, or, in rare circumstances a summary judgment inquiry, independent of the qualified immunity defense. In many cases where a defendant has asserted qualified immunity, dismissal or even an award of summary judgment may be obviously warranted, based upon existing law, without the court ever ruling on the qualified immunity question. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN10] A necessary concomitant to the determination of whether a constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Torts: Public Entity Liability: Immunity

[HN11] On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. Until the threshold immunity question is resolved, discovery should not be allowed.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN12] The phrase "clearly established law" has an acquired meaning in the qualified immunity context referencing law at the time of the challenged conduct.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN13] When considering whether a plaintiff has asserted a violation a clearly established right, the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged. The rights must be clearly established under the particular circumstances confronting the official at the time of the questioned action. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. The operation of the standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN14] The right that a public official is alleged to have violated must have been "clearly established" in a particularized sense: The contours of the right must be sufficiently clear that a reasonable official would understand that

what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN15] A state government employer violates the United States Constitution if it deprives an employee of a valuable employment benefit in retaliation for the employee's exercise of his constitutionally protected speech. As part of a retaliatory claim, the plaintiff must also allege the requisite causation between the statements made and the retaliatory conduct.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN16] To determine whether a government employee's speech is protected expression entails striking a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN17] A public employee has a protected right, as a citizen, to comment upon matters of public concern. Courts distinguish between speaking as a citizen and as an employee, and focus on speech as a citizen as that for which constitutional protection is afforded. Some courts hold that whether speech is protected depends upon whether the employee is speaking as an employee or as an interested citizen. The task of the courts is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN18] Only infrequently will it be "clearly established" that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a particularized balancing that is subtle, difficult to apply, and not yet well-defined.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN19] Not every restriction on speech is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN20] An adverse employment action does not have to be the substantial equivalent of a dismissal to violate a public employee's rights under the First Amendment.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Supplemental Jurisdiction

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN21] When a court reviews an order denying a claim of qualified immunity on an interlocutory appeal, it may, under the doctrine of pendent appellate jurisdiction and in an exercise of discretion, review all issues that the parties raise and which are reasonably related when that review will advance the litigation or avoid further appeals.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Appeals: Appellate Jurisdiction: Collateral Order Doctrine

Torts: Public Entity Liability: Immunity

[HN22] A court of appeals may hear appeals from "final decisions" of the district courts, 28 U.S.C.S. § 1291, and usually, a denial of summary judgment is not treated as final, and cannot be appealed until the conclusion of a case on the merits. While a small class of exceptions has been permitted, the exceptions arise only where the summary judgment decision finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Under the "collateral-order" doctrine, interlocutory appeals from the denial of qualified immunity are permitted, because, but for the appeal, the defendant would have to stand trial and qualified immunity should have afforded him immunity from suit. Thus, the decision at summary judgment affects a right separate from and collateral to the rights asserted in the action.

Civil Procedure: Appeals: Appellate Jurisdiction: Collateral Order Doctrine

[HN23] To be immediately appealable, an order must (1) be effectively unreviewable on appeal from a final judgment; (2) conclusively determine the disputed question; and (3) resolve an important issue completely separate from the merits of the action.

Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders

[HN24] The rule that, a court of appeals may exercise jurisdiction over an interlocutory appeal, applies in the context of qualified immunity.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Supplemental Jurisdiction

[HN25] Pendent jurisdiction empowers courts to consider issues that overlap with the immunity question. A court's jurisdiction, therefore, is not precluded, but discretionary.

COUNSEL: ARGUED: Kathleen Morris McDonald, IRWIN, KERR, GREEN, MCDONALD & DEXTER, Baltimore, Maryland, for Appellant.

Donald Frederick Chiarello, HOCHBERG, CHIARELLO, COSTELLO & DOWELL, Towson, Maryland, for Appellee.

ON BRIEF: Charles M. Kerr, Brian C. Temple, IRWIN, KERR, GREEN, MCDONALD & DEXTER, Baltimore, Maryland, for Appellant.

Michael P. Tanczyn, Towson, Maryland; Charles Mentzer, Baltimore, Maryland, for Appellee.

JUDGES: Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges. Judge Luttig wrote the opinion, in which Judge Widener and Judge Williams joined.

OPINIONBY: LUTTIG

OPINION:

[*793] OPINION

LUTTIG, Circuit Judge:

Appellant J. Robert Haines, formerly the Zoning Commissioner of Baltimore County, appeals from an order of the United States District Court for the District of Maryland denying his motion for summary judgment on appellee Frank M. DiMeglio's federal section 1983 and state law claims. Because the district court erred in denying Haines qualified immunity on the section 1983 claim, we vacate the judgment below[**2] and remand with instructions to enter judgment in favor of Haines on that claim.

I.

Haines served as Zoning Commissioner for the Office of Zoning for Baltimore County ("the Office") from 1987 to 1991. During his tenure, the practice of the Office was to assign each zoning inspector a specific geographic area of the county within which to investigate zoning violations; the seven areas of assignment roughly equalled the seven council districts. In March 1989, the Office hired DiMeglio as its eighth zoning inspector. Apparently, the Office did not redraw the assignment areas upon DiMeglio's hire, in part because no government vehicle was available for his exclusive use. Instead, the Office positioned him to serve in an at-large or county-wide capacity to handle overflow cases.

In August 1990, DiMeglio was investigating "the Partlett case," and, with Haines' approval, had issued a citation against the Partletts for several zoning violations. On September 11, 1990, DiMeglio, as a representative of the Office, attended a meeting of the Earl's Beach Improvement Association ("EBIA"), a citizens' group concerned with the case. DiMeglio learned that the Partletts' attorney had proposed a settlement[**3] between his client and the EBIA, whereby the Partletts would correct some, but not all, of the zoning violations and would pay \$2500 [*794] towards the EBIA's attorney's fees. At this point, DiMeglio addressed the meeting, stating essentially that the offer was not a "good deal" because the EBIA could not agree to permit the Partletts to continue violating pertinent zoning requirements. J.A. at 12-

13. Shortly thereafter, DiMeglio alleges that Haines personally reprimanded him for giving legal advice to the EBIA and that Haines convened a meeting of all zoning inspectors where he "admonished them against giving 'legal advice' to citizens' groups." J.A. at 14. Also, according to DiMeglio, in October or November 1990, Haines advised DiMeglio that "the citizens complaining about the zoning violation on the Partlett property 'don't care anymore' and that 'a deal is being made at the Board [of Appeals].'" J.A. at 15-16 (alteration in original). Haines allegedly also stated, regarding a hearing on the case, that, "Nobody's going to show up. Don't stick your neck out. I won't back you up." J.A. at 16.

In December 1990, Haines redrew the seven zoning-inspector territories into eight territories. [**4] Seven of the eight inspectors were then reassigned, including DiMeglio, who was assigned to a territory in northern Baltimore County. The reassignment coincided with an additional county vehicle becoming available for DiMeglio's sole use. DiMeglio's salary and benefits were not reduced, nor were any perquisites of his office adjusted or eliminated. DiMeglio also contends that after this reassignment, Haines told him that "you'll never be promoted in this Office," J.A. at 17, however at no time after these actions occurred was DiMeglio eligible for or denied a promotion.

Almost three years later, DiMeglio brought this suit under 42 U.S.C. § 1983, alleging that Haines had violated his rights under the First and Fourteenth Amendments by reassigning him to a different enforcement territory in retaliation for his exercise of free speech. DiMeglio also asserted state law claims, including a violation of Article 40 of the Maryland Declaration of Rights and common-law tortious interference with contract.

Haines pleaded a defense of qualified immunity and moved for summary judgment on that ground. The district court, without a hearing and by letter order [**5] dated April 7, 1994, denied Haines' motion summarily, stating only that "there are differences as pointed out in the motion as well as in the plaintiff's response" and "since discovery has not been completed, summary judgment at this time is inappropriate under the appropriate court rulings." J.A. at 245. Haines filed this interlocutory appeal. See *Mitchell v. Forsyth*, 472 U.S. 511, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985).

II.

A.

[HN1] Government officials are protected by qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). For this reason, immunity shields officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). When a plaintiff seeks to hold an official personally liable for his exercise of a discretionary function, the court must, in addressing the qualified immunity defense, consider whether the plaintiff has alleged a violation [**6] of law that was clearly established at the time the challenged actions were taken. This inquiry is a pure question of law, see *Harlow*, 457 U.S. at 818, and "hence always capable of decision at the summary judgment stage." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992). See also *Siebert v. Gilley*, 500 U.S. 226, 231, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991); *Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."). n1 [*795] Indeed, the Supreme Court has repeatedly recognized that because the question of immunity is essentially a legal question, see *Mitchell*, 472 U.S. at 526, "immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991). "Even such pretrial matters as discovery are to be avoided if possible, as 'inquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell*, 472 U.S. at 526 [**7] (second alteration in original) (quoting *Harlow*, 457 U.S. at 817).

-----Footnotes-----

n1 [HN2] Only if a court determines that the plaintiff has alleged a violation of a right clearly established at the time the actions occurred should it proceed to determine whether a reasonable person in the official's position would have known that his actions violated that right. When the inquiry proceeds to this point, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct," *Harlow*, 457 U.S. at 818-19; however, the defendant may still be able to show "extraordinary circumstances" and "prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819. Since such a claim would turn "primarily on

objective factors," *id.*, this determination, too, is "also a matter of law for the courts," *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990).

-----End Footnotes-----

[**8]

[HN3] A district court may deny a motion for summary judgment based on qualified immunity and allow discovery to proceed only if it has addressed the threshold immunity question, and concluded (1) that the plaintiff alleged a violation of a clearly established right, but (2) that there existed a material factual dispute over what actually occurred, and (3) under the defendant's version, a reasonable official could have believed that his conduct was lawful. *Anderson*, 483 U.S. at 646-47 n.6. In instances where there is a material dispute over what the defendant did, and under the plaintiff's version of the events the defendant would have, but under the defendant's version he would not have, violated clearly established law, it may be that the qualified immunity question cannot be resolved without discovery. *Id.* In such circumstances, it simply may be impossible to protect the defendant from all of the burdens that attend the pretrial process. Of course, after discovery and upon a proper motion, the district court may reconsider the question of qualified immunity. "If discovery failed to uncover evidence sufficient to create a genuine issue as to whether [**9]the defendant in fact committed those acts," the defendant will yet be entitled to summary judgment, even though the acts alleged by the plaintiff constitute a violation of clearly established rights. *Mitchell*, 472 U.S. at 526; see *Turner v. Dammon*, 848 F.2d 440, 443-44 (4th Cir. 1988).

B.

Although the Supreme Court's decision in *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991), has generated significant confusion, that case did not, contrary to the view of almost every court, effect a fundamental change in this analytical framework for deciding whether an official is entitled to qualified immunity. The Court in *Siegert* did nothing other than clarify that this is the framework within which the qualified immunity analysis is to be undertaken, as it said it was doing.

A large number of courts have read *Siegert* as requiring a determination, under current law, of whether the plaintiff has stated a claim upon which relief can be granted. Some of these courts seem to read *Siegert* to require this Rule 12(b)(6) or Rule 12(b)(6)-like determination as the first step of the qualified immunity[**10] analysis. For example, in *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993), the Tenth Circuit concluded that "a court reviewing a qualified immunity claim [must] analyze the state of the law at two different times": It "must analyze the law at the time of trial to determine whether the plaintiff has alleged a violation of existing law," and then "analyze the law at the time of the alleged conduct in order to determine whether the plaintiff has established that the defendant's conduct, when perpetrated, violated clearly established law." *Id.* at 779-80. Applying this analytical structure, the court held that the plaintiff "failed to demonstrate that [the defendants'] conduct violated the current Fourth Amendment standard governing excessive force claims." *Id.* at 780. This "failure to satisfy the first prong . . . [**11] rendered it unnecessary for [the court] to consider whether [the plaintiff] satisfied his burden under the second prong by showing that [the defendants] violated clearly established law." *Id.* See also *Hunter v. District of Columbia*, 291 U.S. App. D.C. 355, 943 F.2d 69, 76 (D.C. Cir. 1991) [**11] (concluding that *Siegert* "mandated" a two-part qualified immunity analysis under which the court must determine whether the complaint alleges both that the plaintiff has been deprived of a constitutional right that exists under current law and that the right in question was "clearly established" at the time the defendant acted); *Bella v. Chamberlain*, 24 F.3d 1251, 1254-56 (10th Cir. 1994) (inquiring first into whether the plaintiff has stated a constitutional claim under current law, "and though this inquiry takes place in the context of a qualified immunity defense," applying "the same rules governing dismissal of complaints"); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) ("At this early stage in the proceedings, the Rule 12(b)(6) defense and the qualified-immunity defense become intertwined."), cert. denied, 113 S. Ct. 1586 (1993). Cf. *Buckley v. Fitzsimmons*, 20 F.3d 789, 792 (7th Cir. 1994) (A court "may" have "to determine whether the complaint states a claim on which relief may be granted" in order to determine[**12] whether "the defendants [are] entitled to qualified immunity given the state of the law when they acted."), cert. denied, No. 94-5989, 1994 WL 512812 (U.S. Jan. 9, 1995).

Other courts that have understood *Siegert* to require a determination of whether the plaintiff has stated a claim upon which relief can be granted seem to view this determination as an independent inquiry antecedent to the qualified

immunity question. See, e.g., *Wilson v. Formigoni*, 1994 U.S. App. LEXIS 35132, 1994 WL 696815, at * 3 (7th Cir. Dec. 14, 1994) ("Before we even reach the immunity claim, the plaintiff's complaint must state a claim on which relief may be granted."); *Spivey v. Elliott*, 29 F.3d 1522, 1524 (11th Cir. 1994) (concluding that *Siebert* requires a determination of whether the plaintiff has alleged a violation of a constitutional right under current law, before considering whether that law was clearly established at the time of the challenged conduct); *Brown v. Nix*, 33 F.3d 951, 953-55 (8th Cir. 1994) (same); *Grady v. El Paso Community College*, 979 F.2d 1111, 1113, 1114 (5th Cir. 1992) ("Our[**13] first step when reviewing the denial of qualified immunity is whether the plaintiff has stated a claim for the violation of federal rights. . . . Because [the] complaint states a violation of federal rights, we turn to the question of whether[the plaintiff] has met his burden on summary judgment of showing that [the defendant's] conduct does not entitle her to qualified immunity."); *Duckett v. City of Cedar Park*, 950 F.2d 272, 279 (5th Cir. 1992) ("We find that *Duckett* . . . has stated a constitutional challenge We now turn to the issue of defendants' entitlement to qualified immunity. . . ." (emphasis in original)). n2

-----Footnotes-----

n2 The distinctions between these first two categories of courts that read *Siebert* as introducing a new requirement of a Rule 12(b)(6) inquiry are often elusive on whether the new inquiry is a part of the qualified immunity analysis or independent of that analysis. A number of the opinions can even be read as internally inconsistent on this question. Compare *Wilson*, 1994 U.S. App. LEXIS 35132, 1994 WL 696815, at * 4 ("If a plaintiff's allegations, even when accepted as true, do not state a cognizable violation of a constitutional right, then the defendant is entitled to qualified immunity."), with *id.* at * 3 ("Before we even reach the immunity claim, the plaintiff's complaint must state a claim on which relief may be granted."); compare *Grady*, 979 F.2d at 1113 ("Our first step when reviewing the denial of qualified immunity is whether plaintiff has stated a claim for the violation of federal rights."), with *id.* at 1114 ("Because *Grady*'s complaint states a violation of federal rights, we turn to the question of whether *Grady* has met his burden on summary judgment of showing that [the defendant's] conduct does not entitle her to qualified immunity."); compare *Duckett*, 950 F.2d at 277 ("The Supreme Court has recognized the question of failure to state a claim as 'an analytically earlier stage of the inquiry into qualified immunity'" (citations omitted)), with *id.* at 279 ("We find that *Duckett* . . . has stated a constitutional challenge. . . . We now turn to the issue of defendants' entitlement to qualified immunity. . . ." (emphasis in original)).

-----End Footnotes-----

[**14]

Still other courts have read *Siebert* as requiring resolution of the merits of the constitutional claim under current law before consideration of the qualified immunity issue. For example, in *Calhoun v. New York State Div. of Parole Officers*, 999 F.2d 647 (2d Cir. 1993), the Second Circuit understood *Siebert* [*797] to have established that "the merits of a constitutional claim are a preliminary inquiry required before passing on an issue of qualified immunity." *Id.* at 652. Accordingly, the court addressed fully the constitutional claim presented, recognizing a particular due process right for the first time in that circuit. *Id.* at 652-54. Only then did the court address the qualified immunity issue, holding that qualified immunity must apply because the legal rule adopted for the first time in that case could not have been clearly established at the time of the defendant's conduct. *Id.* at 654-55. In *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031 (1992), the Sixth Circuit interpreted *Siebert* similarly[**15] and held that the district court erred in granting qualified immunity on the ground that "no clearly established constitutional right" existed, without having first addressed the merits of the constitutional claim. *Id.* at 1034-36; see also *LeRoy v. Illinois Racing Bd.*, 39 F.3d 711, 713 (7th Cir. 1994) ("The merits of the constitutional claim are an antecedent issue whenever the defendants plead immunity. . . ."). The *Silver* court, and perhaps others in this category, read *Siebert* as having "rejected the plaintiff's claim without reaching the qualified immunity issue." See *Silver*, 966 F.2d at 1036.

We believe all of these courts have overread, and in so doing misread, *Siebert*. *Siebert* did not announce any change in qualified immunity law, much less one of the proportion assumed by these courts.

Siegert was an unexceptional application of the Court's established qualified immunity jurisprudence. The decision merely reaffirmed that, [HN4] in deciding qualified immunity claims, courts should determine whether the plaintiff has alleged the violation of a constitutional right[**16] that was clearly established at the time of the defendant's actions, before they proceed to address any ancillary issues. This is apparent from what the Supreme Court identified as the error committed by the court of appeals, the reasoning employed by the Court in addressing that error, and the Court's ultimate holding in the case.

The court of appeals in Siegert had held that defendant Gilley was entitled to qualified immunity because Siegert's complaint, by "failing to offer any direct evidence that the letter [of reference critical of the plaintiff's job performance] was written maliciously," failed to satisfy the circuit's heightened pleading requirement. Siegert, 282 U.S. App. D.C. 392, 895 F.2d 797, 804-05 (D.C. Cir. 1990). In reaching its decision, the court had "assumed, without deciding," that if Gilley had acted with bad faith and malice, as Siegert alleged, "Gilley's actions in writing the letter [would constitute] a violation of Siegert's constitutional rights." Id. at 803.

The Supreme Court held that "the Court of Appeals should not have assumed, without deciding, this preliminary issue . . . nor proceeded to examine the sufficiency[**17] of the allegations of malice." Siegert, 500 U.S. at 232. Rather, the court of appeals should have first resolved the "threshold immunity question" of Harlow -- whether, based on the plaintiff's allegations, the defendant had violated clearly established law at the time of the actions. Id. (quoting Harlow, 457 U.S. at 818) (emphasis added by Court in Siegert). Had the court of appeals undertaken this threshold immunity inquiry, the Supreme Court explained, it would have concluded that "Siegert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but [in light of Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)] he failed to establish the violation of any constitutional right at all." Siegert, 500 U.S. at 233.

Siegert did not mandate that courts determine, as a part of the qualified immunity analysis, whether the plaintiff has stated a claim upon which relief can be granted in a Rule 12(b)(6) sense. It did not direct courts to decide, independent of and prior to addressing a [**18] defendant's entitlement to qualified immunity, whether a plaintiff has stated a claim upon which relief can be granted. Nor did it require that courts decide the merits of the constitutional claim. Consistent with the Court's recitation that it granted certiorari in the case "to clarify the analytical structure under which a claim of qualified [*798] immunity should be addressed," id. at 231, Siegert simply reaffirmed that [HN5] a court reviewing a qualified immunity defense should assess, before anything else, whether the alleged conduct violated law clearly established at the time the conduct occurred. The Court's holding could not have been clearer: "We hold that the petitioner in this case failed to satisfy the first inquiry in the examination of . . . a claim [of qualified immunity]; he failed to allege the violation of a clearly established constitutional right." Id. (emphasis added); see also id. at 236 (Marshall, J., dissenting) (The majority "decides today that petitioner Siegert failed to allege a violation of a clearly established constitutional right. . ."). The term "clearly established" has an acquired[**19] meaning referencing qualified immunity, with its focus on law at the time of the challenged conduct. The Court's use of the term "clearly established" in its holding confirms that it was conducting the typical qualified immunity analysis under Harlow and not a Rule 12(b)(6) inquiry based upon current law.

2.

That the Court did not intend to alter the qualified immunity analysis in any of the ways perceived by the courts above also seems plain for reasons beyond the logic and language of the Siegert opinion.

First, and not insignificantly, the Court has repeatedly explained that [HN6] the immunity inquiry is distinct from both a merits and Rule 12(b)(6) review. See Mitchell, 472 U.S. at 529 n.10 ("The legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful."); id. at 527-28 ("[A] claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated."); id. at 528 [**20] ("An appellate court reviewing the denial of the defendant's claim of immunity need not . . . determine whether the plaintiff's allegations actually state a claim. All it need determine is . . . whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . ."). Cf. Gomez v. Toledo, 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980) ("This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the defendant in question." (citations omitted)).

Second, requiring that courts conduct a Rule 12(b)(6), Rule 12(b)(6)-like, or merits review would threaten to increase the burden of defending suits for public officials whose conduct was reasonable, by expanding the number of issues officials must prepare to address, brief, and argue. Such a requirement would undermine one of the express purposes of immunity, which is, "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siebert*, 500 U.S. at 232.[**21] Moreover, any one of these additional issues could require a greater expenditure of resources even than would be required to advance merely the qualified immunity defense. Often, it will be more difficult to rebut the argument that the plaintiff's complaint states a claim for which relief can be granted under current law or that the plaintiff should prevail on the merits, than it will be to defend against the claim that the actions violated law that was clearly established at the time they were taken. See discussion *infra*. Not only would officials bear the burden of responding to arguments based upon current law, they might be saddled with the additional burdens associated with responding to repleading by the plaintiff in the event of dismissal under Rule 12(b)(6).

Third, if *Siebert* had introduced one of the aforementioned inquiries into the analysis, the conceptual understanding of qualified immunity as a doctrine exclusively focused on the reasonableness of official conduct would have been altered in at least two dramatic ways.

[HN7] An official's entitlement to qualified immunity has never turned on whether his conduct actually violated the law; rather, it has always [*799] turned[**22] on "the 'objective legal reasonableness' of [his] action." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. 800 at 819). However, neither in deciding under Rule 12(b)(6) whether a plaintiff has stated a claim upon which relief can be granted, nor in evaluating the merits of a claim, is the reasonableness of the defendant's actions -the "touchstone" of qualified immunity, *id.* -- determinative or even relevant.

Most important, [HN8] the legal reasonableness of the defendant's actions is to be "assessed in light of the legal rules that were 'clearly established' at the time it was taken," not in light of current law. *Id.* (emphasis added) (quoting *Harlow*, 457 U.S. at 818). In both a merits review and a Rule 12(b)(6) or Rule 12(b)(6)-like review, however, a court generally examines current law. And there is simply no necessary relationship between current and past law such that an inquiry into the former will always inform the inquiry into the latter. A right that exists today may not have existed at the time of the alleged conduct. A right that existed at the time of the conduct may not[**23] exist today. This is especially true in the case of statutory rights, which also can give rise to lawsuits against government officials. For these reasons, current law is not, technically, relevant to the defendant's entitlement to qualified immunity.

[HN9] That current law has no application to the specific question of qualified immunity is not to say that courts should be foreclosed from conducting a Rule 12(b)(6) or 12(b)(6)-like inquiry, or, in rare circumstances a summary judgment inquiry, independent of the qualified immunity defense. In many cases where a defendant has asserted qualified immunity, dismissal or even an award of summary judgment may be obviously warranted, based upon existing law, without the court ever ruling on the qualified immunity question. Recognition of these possibilities is presumably what underlay Justice Powell's observation in *Harlow* that "on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818 (emphasis added). For example, it may be readily apparent on the face of the plaintiffs[**24] complaint that, even accepting the facts as he alleges them to be, he cannot possibly prevail on the merits of his claim under current law. See, e.g., *Buckley v. Fitzsimmons*, 125 L. Ed. 2d 209, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring) ("Many claims directed at [public officials] . . . are probably not actionable under § 1983, and so may be dismissed at the pleading stage without regard to immunity." (emphasis added)). Similarly, in some cases, after discovery limited to the question of qualified immunity, see *Anderson*, 483 U.S. at 646-47 n.6, it may be that no genuine issue of material fact will exist and that the defendant unquestionably will be entitled to judgment as a matter of law on the merits of the plaintiff's claim; discovery could reveal, for example, that the defendant did not even commit the act alleged. In these circumstances, courts should be free to dispose of the case on these grounds, rather than on the ground of qualified immunity.

On the other hand, it will often be more difficult to determine whether the plaintiff has stated a claim under current law or would prevail on the merits, than to [**25] determine whether the plaintiff has alleged the violation of law clearly established at the time the defendant acted. See, e.g., *Calhoun*, 999 F.2d at 652-55 (court conducts lengthy analysis of current law and finds that plaintiff established a constitutional claim, only to dismiss easily on traditional qualified immunity grounds); *Spivey*, 29 F.3d at 1527 (court conducts lengthy analysis of current law even though, at the time of

the defendant's conduct, "no reported case addressed" plaintiff's particular circumstances and "there [was] . . . much room for differing interpretations" of the law). Cf. *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) (concluding it was easier for court of appeals to address sufficiency of plaintiff's allegations of malice than whether substantive right existed in light of *Paul v. Davis*). In these circumstances as well, the courts should be free to decide the case on the most expedient ground. We are confident that the Supreme Court recognizes as much, and for this reason, [*800] would not have imposed a rigid framework requiring a Rule 12(b)(6) or[**26] merits inquiry before or adjunct to consideration of the qualified immunity question.

The magnitude of the conflicts between the discussed interpretations of *Siegert* and the bedrock principles of the qualified immunity doctrine laid down in the Court's pre-*Siegert* cases alone renders it almost inconceivable that the Supreme Court would have effected any of these sea changes without acknowledging that it was doing so -indeed, while expressly purporting not to have modified, but only to have clarified, the established framework. It is especially unlikely that the Court would have fundamentally reshaped the doctrine in *Siegert*, when it appears the Court decided the case on the unexceptional qualified immunity ground that it did, only to avoid a decision on the heightened pleading standard or to clarify its prior holding in *Paul v. Davis*, or, more likely, both. See *Siegert*, 500 U.S. at 236-39 (Marshall, J., dissenting) (criticizing the Court for deciding scope of *Paul v. Davis*, rather than validity of heightened pleading standard on which certiorari had been granted). The parties did not understand any question relating[**27] to the basic framework for deciding qualified immunity claims even to be before the Court. The questions presented to the Court, briefed by the parties, and upon which certiorari was granted, concerned the validity of the heightened pleading standard and whether the plaintiff had met that standard. n3 Neither party in any way addressed the basic framework within which the qualified immunity question is to be decided. Nor did either party even as much as suggest that it first must be decided under current law whether the plaintiff either had stated a claim upon which relief could be granted or would prevail on the merits.

-----Footnotes-----

n3 In his brief, the respondent argued only in a footnote that no violation of a clearly established right existed at the time the actions took place, adding that that issue was not before the Court. See Brief for the Respondent at 26 n.16, *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) (No. 90-96). The petitioner similarly addressed only briefly the question of whether he had alleged the existence of a clearly established constitutional right, and only whether that right existed at the time the alleged unconstitutional actions took place. See Brief for the Petitioner at 17-19, *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) (No. 90-96).

-----End Footnotes-----

[**28]

That the Court itself has not applied or even mentioned a new inquiry in its qualified immunity cases decided after *Siegert* reinforces the conclusion that *Siegert* in no way altered qualified immunity review. Notably, the very next Term in *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam), without even citing *Siegert*, the Court applied its traditional qualified immunity analysis, never asking whether the plaintiff's allegations, if accepted as true, stated a claim upon which relief could be granted.

For all of these reasons, we simply are unable to agree with our sister circuits that *Siegert* represents a significant modification of the official immunity doctrine of *Harlow*.

3.

The courts of appeals have not explained precisely why they read *Siegert* as they do. It appears, however, that all of the different readings are ascribable to an exclusive focus on four isolated statements that appear in *Siegert*, without regard either to the context in which those statements appear or to the context in which the case arose. The courts reading *Siegert* as requiring a Rule 12(b)(6) inquiry within or prior to the qualified immunity[**29] analysis seem to focus on the following two statements: First,

[Siegert's] allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution.

Siegert, 500 U.S. at 227; see also *id.* at 233-34 ("The facts alleged by Siegert cannot . . . be held to state a claim for denial of a constitutional right."); and second,

[HN10] A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff [*801] has asserted a violation of a constitutional right at all.

Id. at 232. Those courts that conclude that Siegert requires a merits review seize upon a third statement, that "Siegert failed not only to allege a violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all." *Id.* at 233 (emphasis added). The fourth misconstrued statement, which is[**30] a source of support for both groups of courts, is that,

[HN11] "on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . Until this threshold immunity question is resolved, discovery should not be allowed."

Id. at 231 (alterations in original) (quoting Harlow, 457 U.S. at 818).

When the first and second statements are read in the context in which they appear in Siegert, and with an understanding of the Court's qualified immunity jurisprudence, it is clear that the Court did not intend by either statement to require a determination under current law of whether the plaintiff has stated a claim in the Rule 12(b)(6) sense, before determining whether the plaintiff alleged a violation of a right clearly established at the time the actions occurred.

If the Court had intended the first statement to reference a Rule 12(b)(6) inquiry, presumably it would not have said in the same sentence that the plaintiff's failure to state a claim represented a failure at "an analytically earlier stage of the inquiry [**31] into qualified immunity," *id.* at 227, because the qualified immunity inquiry, unlike the Rule 12(b)(6) inquiry, is concerned only with the law at the time of the defendant's actions. That it did not intend to impose any such new requirement is confirmed by the Court's restatement of its holding in the analytical portion of its opinion: "We hold that the petitioner in this case failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established right." *Id.* at 231. n4

-----Footnotes-----

n4 There are even more subtle indications throughout Siegert that, even though the Court did not specifically recite the phrases "clearly established law" and "at the time of defendant's actions" each time those phrases would have been relevant, throughout the opinion it was inquiring into whether the plaintiff had stated a violation of law clearly established at the time of the defendant's actions. For example, although the Court stated at one point that the lower court's error was in assuming that the plaintiff had stated "a violation of [his] constitutional rights" (arguably under current law), see Siegert, 500 U.S. at 232, the first time it characterized this error, the Court actually inserted in brackets the term "clearly established," see *id.* at 230 ("Assuming" that proof of malice "would suffice to make Gilley's actions in writing the letter a violation of Siegert's [clearly established] constitutional rights." (brackets added by Supreme Court in Siegert) (quoting Siegert, 895 F.2d at 803)). This insertion presumably was thought necessary in order to clarify that the Court was addressing the clarity of the law at the time of the actions, even if the court of appeals mistakenly had not addressed this issue. Similarly, in discussing the facts, the Court noted that the district court had denied Gilley's "qualified immunity claim" on the ground that "Siegert's factual allegations were sufficient to state violations of a clearly established constitutional right." *Id.*

-----End Footnotes-----

[**32]

If the Court had imposed a separate Rule 12(b)(6) inquiry through the second of these statements, it would not have referred to this inquiry and the qualified immunity inquiry as "necessarily concomitant." While arguably the determinations would be "concomitant," they certainly would not be "necessarily concomitant," because, as noted supra, each inquiry focuses upon the law at a different time. In invoking the notion of concomitance, the Court was simply making the self-evident point that a plaintiff has not alleged the violation of a right clearly established at the time of the conduct, if he has not alleged the violation of a right that existed at that time. The Court was not creating an inquiry of two distinct parts, as has been supposed; n5 [*802] rather, it was merely observing the tautology, in attempted explication, that a right cannot be "clearly" established if it does not even exist.

-----Footnotes-----

n5 The courts that have concluded otherwise undoubtedly have been confused by the Court's earlier reference to a "first inquiry," *Siegert*, 500 U.S. at 231, in the consideration of a qualified immunity claim, in addition to the Court's reference to "concomitant" inquiries. The Court's reference to the "first inquiry," however, was to whether the plaintiff has "alleged the violation of a clearly established constitutional right," not to whether the plaintiff has stated a claim or can win on the merits. *Id.* The succeeding steps of the qualified immunity inquiry, of course, concern the truth of the plaintiff's factual allegations and the objective reasonableness of the officer's belief as to the state of the law. See *Anderson*, 483 U.S. at 646-47 n.6; *Harlow*, 457 U.S. at 818-19.

-----End Footnotes-----

[**33]

This perhaps would have been clearer if the Court had not, in the four sentences immediately preceding its reference to the concomitance of the two inquiries, invited this very confusion. First, the Court stated that the court of appeals had assumed that bad faith would render the defendant's actions a violation of the Constitution, without making explicit that this was a violation of the law at the time of the defendant's conduct. The Court then referred to the question of whether the defendant's actions would have been a violation as the "preliminary issue." And then the Court apparently equated this "preliminary" issue with the "threshold immunity question" referenced in *Harlow*. See *Siegert*, 500 U.S. 226 at 232. There is no question, however, that the "threshold question" in *Harlow* was whether the plaintiff had alleged the violation of a law that was clearly established at the time the action occurred, not whether he had alleged the violation of a right that existed (however clearly) at the time the suit was filed. See *Harlow*, 457 U.S. at 818. Of course, it is the Supreme Court's equating of the "preliminary issue" [**34] of whether a violation was stated with *Harlow*'s "threshold question" that ultimately proves that the court of appeals' error was in assuming that a violation of clearly established law was asserted, and not merely in assuming that a violation was asserted under current law.

At bottom, it appears that each of these first two statements has been misread largely because the courts have failed to appreciate that the Court routinely frames its qualified immunity inquiry as one into whether the plaintiff's allegations "state a claim" or "allege the violation of a right," when it is asking whether the plaintiff has asserted the violation of a right that was clearly established at the time of the defendant's actions. In other words, the Court often uses these phrases as shorthand for the qualified immunity analysis required by *Harlow*, *Mitchell*, *Anderson*, and other pre-*Siegert* cases. In *Mitchell*, for example, the Court observed that "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526.[**35] Indeed, *Siegert* itself used the phrase "failed to allege" in a context where there is no question that the Court was referencing the law at the time of the event, not current law. See *Siegert*, 500 U.S. at 231 (holding that defendant is entitled to qualified immunity because plaintiff "failed to allege the violation of a clearly established constitutional right"). The Court's reference to "clearly established law" in both of these passages removes any doubt that the "failure to allege" locution is not an implicit allusion to a Rule 12(b)(6) analysis, because, as noted supra, [HN12] the phrase "clearly established law" has an acquired meaning in the qualified immunity context referencing law at the time of the challenged conduct.

For the same reasons that the Court could not have been requiring a Rule 12(b)(6) inquiry, with resort to current law, we have no doubt that it was not requiring a merits review when it said in the third statement that qualified immunity was

warranted because the plaintiff "failed to establish the violation of any constitutional right at all." Id. at 233. Siegert itself all but confirms [**36] the error of this interpretation when, on the previous page, it makes the identical point, but phrases it in terms of the plaintiff's failure to "assert[] a violation of a constitutional right at all." Id. at 232 (emphasis added).

Finally, when the fourth statement is read in the context in which it appeared in Harlow, it is likewise clear that the Court was not in any way suggesting that current law [*803] dictates the resolution of the qualified immunity question. The full quotation from Harlow is as follows:

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

Harlow, 457 U.S. at 818 (emphasis added). When the statement is read in its full context, it is [**37] evident that the "threshold immunity question," appearing in the last sentence was a reference to the inquiry into "the law at the time" of the occurrence of the action, which is discussed in the second sentence, not to the "currently applicable law" mentioned in the first sentence. This is all but lost when the second sentence from the block quotation is omitted, as it usually is by courts interpreting Siegert, and as it was in Siegert itself. There is no reason to believe, however, that the Court in Siegert meant by this language anything different than did the Court in Harlow. The reference to "currently applicable law" appears to have been included only to contrast the qualified immunity inquiry (with its focus on law at the time of the actions) with the typical summary judgment question (with its focus on current law).

III.

Turning to the present case, the district court denied Haines' summary judgment motion because "differences" existed between the parties' factual allegations and discovery was not complete. The court did not address whether, based on DiMeglio's allegations, Haines' conduct violated law that was clearly settled at the time the actions occurred. [**38] In failing to resolve this question and permitting discovery to proceed, the district court erred. Had the district court addressed the threshold immunity question, it would have found that Haines was entitled to qualified immunity.

[HN13] When considering whether the plaintiff has asserted a violation a clearly established right, "the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J.) (quoting *Pritchett*, 973 F.2d at 312). The "rights must be clearly established under the particular circumstances confronting the official at the time of the questioned action." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J.) (citing *Anderson*, 483 U.S. at 640); see also *Hodge v. Jones*, 31 F.3d 157, 167 (4th Cir. 1994) (finding the district court's "generalized formulation of a constitutional right" was "a fundamental error"); *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) [**39] ("The right must be clearly established in a particularized relevant sense."); *Gooden v. Howard County, Md.*, 954 F.2d 960, 968 (4th Cir. 1992) (en banc) ("The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful." (quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986))). In *Anderson*, the Supreme Court explained why the focus must be upon the right at this level of particularity:

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, id., at 818.

The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there [**40] is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be [*804] said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually

unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." It should not be surprising, therefore, that our cases establish that [HN14] the right the official is alleged to have violated[**41] must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson contends that the Court of Appeals misapplied these principles. We agree. The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated -- the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances-- was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous.

[**42]

Anderson, 483 U.S. at 639-41 (alteration in original) (citations omitted). If the right is not defined at an appropriately particularized level, an alleged violation of the law that was existing at the time of the challenged conduct necessarily would be an alleged violation of clearly established law, and the reasonableness of the defendant's conduct would be irrelevant.

DiMeglio alleges that Haines violated his First and Fourteenth Amendment rights when Haines retaliated against him for the statements made before the EBIA, by admonishing him for giving legal advice to the citizens' group, by humiliating him in the zoning inspectors' meeting, by instructing him not to testify at the hearing, by telling him he would never be promoted, and, most significantly, by reassigning him to the newly drawn northern Baltimore County region. The Supreme Court's decision in *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and cases following, established that [HN15] a state government employer violates the Constitution if it deprives an employee of a valuable employment benefit in retaliation for the employee's exercise of his constitutionally[**43] protected speech. See *Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990). Focusing upon the alleged violated right at the appropriately particularized level requires that we ask, as the district court should have, whether it was clearly established in the Fall of 1990, when these actions allegedly occurred, (1) that statements such as those made by DiMeglio before the EBIA were constitutionally protected expressions and (2) that retaliatory conduct in the form of a reprimand and reassignment of responsibilities constituted deprivation of a valuable government benefit. n6

-----Footnotes-----

n6 Of course, as part of a retaliatory claim, the plaintiff must also allege the requisite causation between the statements made and the retaliatory conduct. See *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). See also note 7 *infra*.

-----End Footnotes-----

A.

In 1990, as today, [HN16] to determine whether a government employee's speech [*805] was protected expression entailed striking"a[**44] balance between the interests of the [employee], as a citizen, in commenting upon matters of

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Connick v. Myers, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983) (alteration in original) (quoting Pickering, 391 U.S. at 568), quoted in Rankin v. McPherson, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) and Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); see also Waters v. Churchill, 128 L. Ed. 2d 686, 114 S. Ct. 1878, 1884 (1994) (reaffirming the Connick test). We conclude that in at least two respects it was not clearly established that DiMeglio's statement before the EBIA was protected speech.

First, DiMeglio's remarks may not have been protected under Connick because he was speaking as an employee, rather than as a citizen. By 1990, the Supreme Court had repeatedly emphasized that the Pickering doctrine developed to [HN17] protect the right of a public employee "as a citizen, [to] comment[] upon matters[**45] of public concern." Connick, 461 U.S. at 143 (emphasis added). Although the Court had not expressly held that speech uttered within the employee's public capacity was not protected, the Court had distinguished between speaking as a citizen and as an employee, and had focused on speech as a citizen as that for which constitutional protection is afforded. See *id.* at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government. . ."). Therefore, it was, and is, not clear that when an individual presents himself as speaking in his capacity as a public employee, that his speech is protected. Only a few years before the time of the alleged actions here, the Fifth Circuit actually had held that whether speech is protected under Connick depends upon whether the employee is speaking as an employee or as an interested citizen, see *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 93 L. Ed. 2d 997, 107 S. Ct. 948 (1987):

Because almost anything that occurs within[**46] a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Id. at 1362 (citations omitted); see also *Holland v. Rimmer*, 25 F.3d 1251, 1255-56 (4th Cir. 1994) (finding communications made "in the course of carrying out [plaintiff's] legitimate job duties" and "between employees speaking as employees" were not of public concern). DiMeglio readily admits in his complaint that he attended the meeting in question "as a representative of the Zoning Commissioner's Office," J.A. at 12, and made the statements "in the good-faith performance of his public duties," J.A. at 13. Therefore, it is at least questionable whether DiMeglio's comments, spoken within his public role and concerning a matter[**47] within the scope of his responsibilities, were protected expressions upon which a retaliation claim could be based. Cf. Connick, 461 U.S. at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."). Accordingly, Haines reasonably could have believed that DiMeglio's speech was not protected.

Even if DiMeglio was speaking as a private citizen and on a matter of public concern, as he maintained for the first time at argument, it is still not clear that his speech would have been protected, since the interests of the State in preventing disruption of the orderly management of its offices might well have outweighed DiMeglio's interests in expressing himself on the subject and in the [*806] manner, time, and place that he did. See Connick, 461 U.S. at 152-53; Rankin, 483 U.S. at 388.[**48] Haines could have reasonably believed that DiMeglio's statements, made seemingly with the imprimatur of the Office, yet contrary to his employer's managerial decision as to the Partlett matter, sufficiently disrupted the function of the Office as to outweigh any interests DiMeglio might have had in expressing himself on that subject. A government employer, no less than a private employer, is entitled to insist upon obedience to the legitimate, day-to-day decisions of the office without fear of reprisal in the form of lawsuits from disgruntled subordinates who believe that they know better than their supervisors how to manage office affairs.

In sum, regardless of how DiMeglio characterizes his speech before the EBIA, it was not in 1990 (nor is it even now) clearly within the protected expression of a public employee under the First Amendment. Indeed, [HN18] only infrequently will it be "clearly established" that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a "particularized balancing" that is subtle, difficult to apply, and not yet welldefined. Connick, 461 U.S. at 150; *Jackson v. Bair*, 851 F.2d 714, 717 (4th Cir. 1988);[**49] see Connick, 461 U.S. at 154 ("We do not deem it either appropriate or feasible to attempt to lay down a general standard

against which all statements may be judged." (quoting *Pickering*, 391 U.S. at 569)); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interest may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity."); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987) ("When the law requires a balancing of competing interest, . . . it may be unfair to charge an official with knowledge of the law in absence of a previously decided case with clearly analogous facts.") (citation omitted); *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir.) ("If the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can[**50] rarely be considered 'clearly established,' at least in the absence of closely corresponding factual and legal precedent."), cert. denied, 484 U.S. 828, 98 L. Ed. 2d 58, 108 S. Ct. 97 (1987); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.) (A constitutional rule that "involves the balancing of competing interests" is "so fact dependent that the 'law' can rarely be considered 'clearly established.'"), cert. denied, 479 U.S. 848, 93 L. Ed. 2d 109, 107 S. Ct. 172 (1986).

B.

Even if DiMeglio's statements before the EBIA were protected under *Connick*, it was not clearly established in 1990 that Haines' conduct deprived DiMeglio of a valuable government benefit or caused him adversity rising to the level of a constitutional violation. [HN19] Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory. See *ACLU of Md. v. Wicomico County*, Md., 999 F.2d 780, 785 (4th Cir. 1993); *Stott v. Haworth*, 916 F.2d 134, 140 (4th Cir. 1990). In June 1990, a sharply divided Supreme Court held for the first time that [HN20] an [**51]adverse employment action did not have to be the substantial equivalent of a dismissal to violate a public employee's rights under the First Amendment. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75-76, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990). While the Court recognized that a failure to rehire, a denial of promotion, or a denial of a transfer, may constitute a deprivation of a valuable government benefit, see *id.* at 73-76, it did not hold, nor had this circuit at that point held, that an employment action less onerous than those amounted to a constitutional deprivation. See *Akers v. Caperton*, 998 F.2d 220, 226-28 (4th Cir. 1993). At most, Haines retaliated by assigning DiMeglio to a geographic subset of the very region from which he formerly had derived his zoning assignments; there was no change in his general duties, pay, benefits, or perquisites of office. Because this action is less severe than those adverse actions recognized by the Supreme [*807] Court in *Rutan*, it was not clearly established in December 1990 that Haines' reassignment of DiMeglio's job responsibilities rose to the level of a constitutional[**52] deprivation. The alleged reprimand that Haines directed at all the zoning inspectors was even more innocuous and certainly not clearly an actionable adverse employment action. Even today, the equivalent of Haines' action likely would not be sufficiently adverse to implicate the First Amendment. See *ACLU of Md.*, 999 F.2d at 785-86 (holding that withdrawal of ACLU's paralegal's "contact visits" with inmates, even if retaliatory, was not sufficiently adverse to the ACLU to implicate First Amendment right to petition); *Dorsett v. Board of Trustees*, 940 F.2d 121, 123 (5th Cir. 1991) (finding professor's alleged harms, comprising adverse decisions on teaching assignments, pay increases, and administrative matters, in retaliation for public speech critical of his employer did not rise to the level of a constitutional deprivation). n7

-----Footnotes-----

n7 Because neither the first nor second element of a First Amendment retaliation claim was met, we need not address the third element, which requires that the plaintiff establish causation. See *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985) ("Public employee speech not on matters of 'public concern' simply enjoys no protection against employer disciplinary action. . . ."), cert. denied, 476 U.S. 1159, 90 L. Ed. 2d 720, 106 S. Ct. 2278 (1986); *ACLU of Md.*, 999 F.2d at 785 ("Where there is no impairment of the plaintiff's right, there is no need for the protection provided by a cause of action for retaliation. Thus, a showing of adversity is essential to any retaliation claim.").

-----End Footnotes-----

[**53]

Given that it was not clear as a matter of law that DiMeglio's speech was protected under *Connick* nor that a reassignment or reprimand was a deprivation of a valuable government benefit, it could not have been apparent under

then-existing law that Haines' conduct was unlawful. The district court accordingly erred in not holding that Haines was entitled to qualified immunity.

IV.

Haines asks us to review several additional issues arising from his motion before the district court. In *O'Bar v. Pinion*, 953 F.2d 74 (4th Cir. 1991), we concluded that, [HN21] when a court reviews an order denying a claim of qualified immunity on an interlocutory appeal, it may, under the doctrine of pendent appellate jurisdiction and in an exercise of discretion, "review all issues that the parties raise and which are reasonably related when that review will advance the litigation or avoid further appeals." *Id.* at 80. On this reasoning, the court "looked at not only the immediate immunity issue, but beyond to the very related issues of whether the conduct of the defendants denied [the plaintiff his constitutional rights]." *Id.* The court [**54] in *O'Bar*, however, did not address the Supreme Court's decision in *Abney v. United States*, 431 U.S. 651, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977), or the majority's opinion in *Mitchell*, two decisions that draw into question the correctness of *O'Bar*'s conclusion as to the reviewability of such claims.

The general rule, of course, is that [HN22] the courts of appeals may hear appeals from "final decisions" of the district courts, 28 U.S.C. § 1291, and usually, a denial of summary judgment is not treated as final, and cannot be appealed until the conclusion of a case on the merits. While a "small class" of exceptions, such as that announced in *Mitchell v. Forsyth* has been permitted, these exceptions arise only where the summary judgment decision "finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949); see also *Digital Equip. Corp. v. Desktop Direct, Inc.*, 128 L. Ed. 2d 842, 114 S. Ct. 1992 (1994). [**55] Under this so-called "collateral-order" doctrine, interlocutory appeals from the denial of qualified immunity were permitted, because, as noted above, but for the appeal, the defendant would have to stand trial and qualified immunity should have afforded him immunity from suit. Thus, the decision at summary judgment affects a right separate from and collateral to the rights asserted in the action. In contrast, none of Haines' remaining issues meets [*808] the requirements of the collateral-order doctrine. n8

-----Footnotes-----

n8 [HN23] To be immediately appealable, an order must (1) be effectively unreviewable on appeal from a final judgment; (2) conclusively determine the disputed question; and (3) resolve an important issue completely separate from the merits of the action. *Mitchell*, 472 U.S. at 527-28.

-----End Footnotes-----

In *Abney v. United States*, the Supreme Court emphasized, in holding that a court of appeals may exercise jurisdiction over an interlocutory appeal in the criminal context, that the Court did "not hold that [**56] other claims contained in the motion to dismiss are immediately appealable as well." 431 U.S. at 662-63 (emphasis added). The Court explained:

Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality. Quite obviously, such considerations do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within Cohen's collateral-order exception to the final judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 663. n9 Citing *Abney*, we concluded that, when addressing the issue of absolute immunity in an interlocutory appeal, [**57] we lacked jurisdiction to review other claims raised below. *Front Royal & Warren County Indus. Park*

Corp. v. Town of Front Royal, Va., 945 F.2d 760, 762-63 (4th Cir. 1991) ("The fact that we had jurisdiction over the district court's order regarding absolute immunity did not permit us to review other claims raised below. We could have considered the [other] issues only if [they] fell within the exception to the final judgment rule set out in Cohen." (citations omitted)), cert. denied, 117 L. Ed. 2d 620, 112 S. Ct. 1477 (1992).

-----Footnotes-----

n9 That [HN24] the limitation announced in Abney applies equally in the context of qualified immunity is a reasonable inference, since the Supreme Court relied on the general holding in Abney-- that a denial of a defendant's claim of a right not to stand trial on double jeopardy grounds is immediately appealable -- to find a denial of qualified immunity is immediately appealable in Mitchell v. Forsyth. Mitchell, 472 U.S. at 525, 527.

-----End Footnotes-----

[**58]

From these authorities, it might appear that we may not address the remaining claims presented in connection with Haines' appeal on qualified immunity. However, despite the reasoning in Abney and its application in Front Royal, this circuit held in O'Bar and elsewhere that [HN25] pendent jurisdiction empowers us to consider issues that overlap with the immunity question. See also Rowland, 1994 WL 664353, at * 6; ACLU of Md., 999 F.2d at 784, 787. Our jurisdiction, therefore, is not precluded, but discretionary. Nevertheless, "taking into consideration factors of judicial economy, injudicious intermeddling, and justice in the disposition," O'Bar, 953 F.2d at 80, we decline in our discretion to address the remaining claims that Haines raises on this interlocutory appeal.

CONCLUSION

The order of the district court denying summary judgment for Haines on qualified immunity grounds is vacated. The case is remanded to the district court with instructions to enter summary judgment for Haines on DiMeglio's section 1983 claim.

VACATED[**59] AND REMANDED WITH INSTRUCTIONS

GLORIA W. DOWE, Plaintiff-Appellant, v. TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY,
Defendant-Appellee.
No. 97-1673

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

145 F.3d 653; 1998 U.S. App. LEXIS 11631; 77 Fair Empl.Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

May 8, 1998, Argued
June 3, 1998, Decided

SUBSEQUENT HISTORY: [**1] As Amended June 24, 1998.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
Jackson L. Kiser, Senior District Judge. (CA-95-1273-R).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee filed suit against appellee employer alleging employment discrimination under 42 U.S.C.S. §§ 1981, 1983, and 2000e et seq. The United States District Court for the Western District of Virginia granted the employer's motion for summary judgment. The employee appealed.

OVERVIEW: An employee contended that she was terminated by her employer in retaliation for having filed a charge of race discrimination with the Equal Employment Opportunity Commission. The court held that the district court did not err in granting the employer's motion for summary judgment. The employee failed to offer sufficient evidence to establish that a causal connection existed between the protected activity and the adverse employment action. As a result, she could not establish a prima facie case of retaliation under Title VII, 42 U.S.C.S. § 2000e et seq. The employee also failed to demonstrate sufficient state involvement to invoke 42 U.S.C.S. § 1983. The employer could not be described in all fairness as a state actor, because the employee did not present sufficient evidence that the commonwealth was involved in the employer's decision to terminate her employment.

OUTCOME: The order granting summary judgment for an employer was affirmed.

CORE TERMS: protected activity, retaliation, prima facie case, summary judgment, causal connection, invoke, reprimanded, regulated, funded, probation, state action, state actor, involvement, adverse action, decisionmaker, undisputed, unaware, evidence sufficient, nonmoving party, termination, terminated, personnel, funding, race discrimination, job performance, supervisor, Fourteenth Amendment, employment discrimination, color of state law, federal government

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN1] The court reviews de novo the district court's decision to grant summary judgment. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the evidence of the nonmoving party is to be believed and all justifiable inferences must be drawn in her favor.

145 F.3d 653, *, 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

Labor & Employment Law: Discrimination: Disparate Treatment

Labor & Employment Law: Discrimination: Retaliation

[HN2] To prevail on a retaliation claim, an employee must satisfy the three step proof scheme established in McDonnell Douglas. First, the employee must establish, by a preponderance of the evidence, a prima facie case of retaliation. Once established, the burden shifts to the employer to rebut the presumption of retaliation by articulating non-retaliatory reasons for its actions. If the employer meets its burden of production, the presumption raised by the prima facie case is rebutted and drops from the case, and the employee bears the ultimate burden of proving that she has been the victim of retaliation.

Labor & Employment Law: Discrimination: Retaliation

[HN3] To establish a prima facie case of retaliation under Title VII, 42 U.S.C.S. § 2000e et seq. a plaintiff is required to prove (1) that she engaged in a protected activity, (2) that an adverse employment action is taken against her, and (3) that there is a causal connection between the first two elements.

Labor & Employment Law: Discrimination: Retaliation

[HN4] Evidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to satisfy the less onerous burden of making a prima facie case of causation.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN5] To prevail on a 42 U.S.C.S. § 1983 claim, an employee must establish: (1) that she is deprived of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the conduct complained of is committed by a person acting under the color of state law. 42 U.S.C.S. § 1983.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN6] Acting under color of state law is equivalent to that of state action under the Fourteenth Amendment.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN7] 42 U.S.C.S. § 1983 does not apply to federal actors.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN8] The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment. Rather, a claimant must also show that there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN9] The receipt of public funds does not make an agency's discharge decisions acts of the state. Rather, to establish state action, there must be evidence that terminations are compelled or influenced by the state.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN10] The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN11] A state can be held responsible for a private decision only when it exercises coercive power or provides such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.

COUNSEL: ARGUED: Helen Jean Spence, BELLER & SPENCE, P.C., Christiansburg, Virginia, for Appellant.

Jonathan Martin Rogers, JONATHAN ROGERS, P.C., Roanoke, Virginia, for Appellee.

JUDGES: Before LUTTIG and WILLIAMS, Circuit Judges, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation. Judge Williams wrote the opinion, in which Judge Luttig and Judge Traxler joined.

OPINIONBY: WILLIAMS

OPINION: [*654] OPINION

WILLIAMS, Circuit Judge:

Gloria W. Dowe appeals the district court's grant of summary judgment to her former employer on her claims of employment discrimination under 42 U.S.C.A. §§ 1981 (West [*655] 1994), 1983 (West Supp. 1998), & 2000e et seq. (Title VII) (West Supp. 1998). Dowe argues that summary judgment was inappropriate because she established a prima facie case of retaliation under Title VII, and demonstrated sufficient state involvement to invoke § 1983. We disagree. A plaintiff cannot establish a prima facie case of retaliation when, as here, the relevant decisionmaker[**2] was unaware that the plaintiff had engaged in a protected activity. Similarly, a plaintiff cannot invoke § 1983 simply because a private actor is regulated and funded by the State. Accordingly, we affirm the judgment of the district court.

I.

In 1965, Dowe, who is black, was hired by Total Action Against Poverty (TAP) to work in its Head Start Program in Roanoke Valley, Virginia. In 1986, Dowe became the Social Services Coordinator at Head Start. Five years later, the position of Social Services Coordinator was divided into two positions: Parent Involvement Coordinator and Social Services Coordinator. Dowe was given her choice of positions and selected Parent Involvement Coordinator.

Shortly thereafter, Dowe decided that she disliked her new position. As a result, Dowe asked the Director of the Head Start program, Cleo Sims, if she could be the Social Services Coordinator. When Sims, who is black, selected Annette Lewis, who is also black, for the position of Social Services Coordinator, Dowe filed a Complaint with the EEOC charging that her request to be named Social Services Coordinator was denied on account of her race. n1

-----Footnotes-----

n1 Dowe also claimed that she was denied annual leave because she was black. In dismissing this claim, the EEOC noted that Dowe had actually conceded that "she did not have all her work completed" when she requested leave. This concession, the EEOC concluded, provided TAP with a legitimate, nondiscriminatory reason for denying Dowe annual leave.

-----End Footnotes-----

[**3]

Before TAP became aware of Dowe's complaint with the EEOC, Dowe had been reprimanded for work-related deficiencies. In particular, Sims reprimanded Dowe for ignoring four requests to prepare a work plan (the Plan) and for poor record keeping. After TAP became aware of Dowe's complaint with the EEOC, numerous other failures in her job performance were noted. Specifically, Sims reprimanded Dowe for maintaining a poor filing system, failing to keep commitments to several clients, and for "calling in sick" to avoid specific work assignments.

Because of Dowe's failure to complete the Plan, Sims drafted one for her. On June 1, 1992, Sims and Dowe met to discuss the proposed Plan. Dowe disagreed with one of the Plan's objectives, however, and refused to sign it. Dowe was informed that if she did not sign the Plan by June 8, 1992, she would be placed on probation. Despite the threat, Dowe continued her refusal to sign the Plan. On June 16, 1992, Dowe was placed on probation.

On August 21, 1992, Dowe's charge of race discrimination was dismissed by the EEOC. The EEOC found no violations of any statute and concluded that Dowe was not a victim of discrimination. On appeal, Dowe concedes that[**4] her initial charge of race discrimination was without merit.

In late 1992, Dowe's probation ended, and she became a Family Service Specialist. Within several months, Dowe was reprimanded by Lewis, her new supervisor. In particular, Dowe was reprimanded for not completing child abuse

145 F.3d 653, *; 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

training, failing to collect the appropriate parent surveys, and attending Parent Policy Council meetings without permission. The following month, Dowe was reprimanded by Lewis for disrupting a Parent Policy Committee meeting. Dowe responded to the reprimand by informing Lewis that she would continue to attend Parent Policy Committee meetings despite being directed not to do so. Despite Dowe's insubordination, no action was taken against her at this time.

In December of 1994, Dowe was placed under the supervision of Katie Weddington. Although Dowe's caseload was reduced, Dowe's job performance, including her record keeping, did not improve. As a result of these deficiencies, Dowe was placed on probation for a second time. Under the terms of her probation, Dowe was given specific [*656] dates upon which to complete her projects and paperwork. On April 13, 1995, after Dowe failed to meet these deadlines, Weddington[**5] fired Dowe.

Dowe filed suit in the United States District Court for the Western District of Virginia alleging employment discrimination under 42 U.S.C.A. §§ 1981, 1983, and 2000e et seq. In particular, Dowe contends that she was terminated by TAP in retaliation for having filed a charge of race discrimination with the EEOC. Following discovery, TAP moved for summary judgment. After briefing and oral argument, the district court granted TAP's motion. In ruling on her Title VII claim, the district court found that Dowe failed to meet "her burden of establishing the required causal connection between the protected activity and the adverse action." (J.A. at 201.) With respect to her § 1981 claim, the district court found that she failed to establish that her "termination was racially motivated." (J.A. at 202.) Finally, the district court found that Dowe had "not demonstrated sufficient state involvement to invoke section 1983." (J.A. at 203.) This appeal followed.

II.

On appeal, Dowe contends that she (1) established a prima facie case of retaliation under Title VII and (2) demonstrated sufficient state involvement to invoke § 1983. n2 As a result, she argues that the district[**6] court erred in granting summary judgment to TAP. [HN1] We review de novo the district court's decision to grant TAP summary judgment. See *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir. 1997). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In deciding whether there is a genuine issue of material fact, the evidence of the nonmoving party is to be believed and all justifiable inferences must be drawn in her favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). With these principles in mind, we address Dowe's arguments in turn.

-----Footnotes-----

n2 On appeal, Dowe does not challenge the district court's finding that she failed to establish a claim under § 1981.

-----End Footnotes-----

A.

[HN2] To[**7] prevail on her retaliation claim, Dowe must satisfy the three step proof scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). First, Dowe must establish, by a preponderance of the evidence, a prima facie case of retaliation. Once established, the burden shifts to TAP to rebut the presumption of retaliation by articulating non-retaliatory reasons for its actions. Cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If TAP meets its burden of production, the presumption raised by the prima facie case is rebutted and "drops from the case," *id.* at 255 n.10, and Dowe bears the ultimate burden of proving that she has been the victim of retaliation, see *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-11, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

145 F.3d 653, *, 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

On appeal, Dowe first contends that she established a prima facie case of retaliation under Title VII. [HN3] To establish a prima facie case of retaliation under Title VII, a plaintiff is required to prove (1) that she engaged in a protected activity; (2) that an adverse employment action was taken against her; and (3) that[**8] there was a causal connection between the first two elements. See *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 754 (4th Cir.), cert. denied, 519 U.S. 818, 136 L. Ed. 2d 30, 117 S. Ct. 70 (1996). It is undisputed that Dowe engaged in protected activity when she filed her discrimination charge with the EEOC. See, e.g., *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (filing a complaint with the EEOC is a protected activity). It is also undisputed that an adverse employment action was taken against Dowe. See, e.g., *Hartsell [*657] v. Duplex Products, Inc.*, 123 F.3d 766, 775 (4th Cir. 1997) (recognizing that discharge is an adverse employment action). To survive summary judgment, therefore, Dowe must have evidence from which a reasonable factfinder could conclude that a causal connection exists between the protected activity and the adverse action. See *Anderson*, 477 U.S. at 248 (holding that summary judgment is appropriate "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party"); see also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985) (noting that "the nonmoving party must produce 'specific facts[**9] showing that there is a genuine issue for trial,' rather than resting upon the bald assertions of his pleadings" (quoting Fed. R. Civ. P. 56(e))); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (noting that there is an affirmative duty for "the trial judge to prevent factually unsupported claims and defenses from proceeding to trial" (internal quotation marks omitted)).

To satisfy the third element, the employer must have taken the adverse employment action because the plaintiff engaged in a protected activity. Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case. See, e.g., *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267 (5th Cir. 1994) (dismissing claim because no evidence that relevant decisionmaker knew that plaintiff had complained of discrimination); *Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988) (dismissing claim because relevant decisionmaker was unaware that plaintiff had filed a complaint with[**10] the EEOC); *Talley v. United States Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983) (dismissing claim because no evidence that supervisor who made adverse personnel decision was aware that plaintiff had engaged in a protected activity). Here, it is undisputed that Weddington -- the relevant decisionmaker -- was unaware that Dowe had ever filed a complaint with the EEOC. As a consequence, Dowe cannot establish the necessary causal connection between her filing a complaint with the EEOC and her termination. It necessarily follows, therefore, that Dowe cannot establish a prima facie case of retaliation.

In addition, we note that over three years lapsed between the protected activity and the adverse employment action. This Court has held that [HN4] evidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to "satisfy the less onerous burden of making a prima facie case of causation" *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). We believe the opposite to be equally true. A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action, [**11] as was the case here, negates any inference that a causal connection exists between the two. See *Burrus v. United Tel. Co.*, 683 F.2d 339, 343 (10th Cir. 1982) (holding that three years between the protected activity and the adverse employment action was too long to establish the third element); *Clark v. Chrysler Corp.*, 673 F.2d 921, 930 (7th Cir. 1982) (holding that two-year time lapse negated any inference of causal connection). Indeed, were this not the case, an employee could guarantee his job security simply by filing a frivolous complaint with the EEOC on his first day of work. Title VII was not enacted to guarantee tenure in the workplace.

In sum, we conclude that Dowe has failed to forecast evidence sufficient to establish that a causal connection exists between the protected activity and the adverse employment action. n3 As a result, Dowe cannot establish a prima facie case of retaliation under Title VII. Accordingly, the district court did not err in granting TAP's motion for summary judgment. See Fed. R. Civ. P. 56(c); see also *Celotex*, 477 U.S. at 322 ("The plain language of Rule 56(c) mandates the entry of summary judgment, after [*658] adequate time for discovery [**12]and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). n4

-----Footnotes-----

145 F.3d 653, *, 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

n3 We also note that it is undisputed that Dowe was reprimanded by her then supervisor on several occasions prior to filing her complaint with the EEOC. This fact also undermines Dowe's contention that she was terminated because she participated in a protected activity.

n4 Even assuming that Dowe forecasted evidence sufficient to establish a causal connection between the protected activity and the adverse action -- therefore establishing a prima facie case of retaliation -- TAP articulated legitimate, nonretaliatory reasons for Dowe's discharge (i.e., her poor job performance, her failure to keep the terms of her probation, and her disruptive behavior). To avoid summary judgment, therefore, Dowe must also forecast evidence sufficient to establish that she was the victim of retaliation (i.e., TAP's nonretaliatory reason was pretextual). As the district court noted, Dowe simply failed to do so. In fact, Dowe admitted that her performance "came up short." (J.A. at 120.)

-----End Footnotes-----

[**13]

B.

We now consider whether the actions of TAP give rise to liability under § 1983. [HN5] To prevail on her § 1983 claim, Dowe must establish:

(1) that she has been deprived of a right, privilege or immunity secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under the color of state law. See 42 U.S.C.A. § 1983. The district court concluded that Dowe failed to establish the second element. For the reasons that follow, we agree.

[HN6] Acting under color of state law is equivalent to that of state action under the Fourteenth Amendment. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982) (citing *United States v. Price*, 383 U.S. 787, 794 n.7, 16 L. Ed. 2d 267, 86 S. Ct. 1152 (1966)). The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)). "This fundamental limitation[**14] on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991) (quoting *Lugar*, 457 U.S. at 936-37). The issue presented in this case is whether TAP engaged in state action when it discharged Dowe.

By asserting that TAP is both regulated and funded by the federal government and, to a lesser extent, by the Commonwealth of Virginia, Dowe contends that she has demonstrated sufficient state involvement to invoke § 1983. We disagree. To the extent Dowe contends that TAP is funded and regulated by the federal government, she is really making the case that TAP was acting under the color of federal law. If so, the claim should have been brought under *Bivens v. Six Unknown Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), rather than § 1983. As the Supreme Court made clear in *Wheeldin v. Wheeler*, 373 U.S. 647, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963), [HN7] § 1983 does not apply to federal[**15] actors. *Id.* at 650 n.2. To the extent Dowe contends that TAP is funded and regulated by the Commonwealth, she, for the reasons that follow, has simply failed to demonstrate sufficient state involvement to invoke § 1983.

Although Dowe refers to TAP as "a creature of statute," she fails to provide even one example of how the Commonwealth regulates Head Start programs. Even assuming that the Head Start program in question is extensively regulated by the Commonwealth, [HN8] "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974) (footnote omitted). Rather, Dowe must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351; see also *Lugar*, 457 U.S. at 937 ("Conduct allegedly

145 F.3d 653, *; 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

causing [*659] the deprivation of a federal right" is only actionable under section 1983 when the conduct is "fairly attributable to the state.").

Dowe[**16] also argues that the receipt of state and municipal grants and an exemption from Virginia State personal property taxes provides a sufficient nexus to invoke application of § 1983. n5 As support, Dowe relies principally upon this Court's decision in *Edwards v. Maryland State Fair*, 628 F.2d 282 (4th Cir. 1980). In *Edwards*, our finding of state action was predicated on the fact that the corporation running the Maryland State Fair, albeit private, received substantial funding from the State of Maryland. *Id.* at 285.

Only one year after our decision in *Edwards*, however, the Supreme Court held that a private nursing home was not a state actor despite the fact that it was financed from almost exclusively public sources. See *Blum v. Yaretsky*, 457 U.S. 991, 1011, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1981) (noting that the State paid the medical expenses of more than ninety percent of the patients). The following year, the Supreme Court held that a private school funded primarily by the State was not a state actor. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982). Of particular importance here, the Supreme Court specifically held[**17] that [HN9] the "receipt of public funds does not make [an agency's] discharge decisions acts of the State." *Id.* Rather, to establish state action, there must be evidence that the terminations were "compelled or . . . influenced by [the] State." *Id.* at 841.

-----Footnotes-----

n5 Dowe does not indicate either how much TAP receives in state and municipal grants or what percentage of TAP's budget is funded by the grants.

-----End Footnotes-----

In light of the Supreme Court's decisions in *Blum* and *Rendell-Baker*, it is clear that *Edwards*, to the extent that it holds that substantial funding by the state is sufficient to invoke § 1983, is no longer good law. See *Smith v. Moore*, 137 F.3d 808, 821 (4th Cir. 1998) (noting that a decision of this Court is no longer binding if called into question by an intervening decision of the United States Supreme Court); *Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) (same). It is also worth noting that no Fourth Circuit case has cited *Edwards* since the Supreme Court[**18] decided *Blum* and *Rendell-Baker*. Indeed, the Ninth Circuit recently recognized that its counterpart to *Edwards* was "implicitly overruled by *Rendell-Baker*." *Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1341 (9th Cir. 1997) (recognizing that Supreme Court's holding in *Rendell-Baker* undermines a prior Ninth Circuit opinion that found significant funding and regulations alone would suffice to establish governmental action); cf. *Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 636 (10th Cir. 1983) (noting that prior decision "seemed questionable in light of [*Rendell-Baker*]").

[HN10] The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor. See *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995). In *Nail v. Community Action Agency of Calhoun County*, 805 F.2d 1500 (11th Cir. 1986) (per curiam), the Eleventh Circuit was presented with the precise issue facing this Court. A local Head Start program received significant federal and state funding. An employee that had been terminated[**19] by the program brought suit under § 1983. Because the personnel decision was not controlled by state regulations, the Eleventh Circuit held that the Head Start program could not be described "in all fairness" as a state actor. See *id.* at 1501-02 (citing *Rendell-Baker*, 457 U.S. at 840); see also *Morse*, 118 F.3d at 1343 (holding that the actions of a local Head Start program could not be fairly attributed to the government).

Like the adverse employment action in *Blum*, *Rendell-Baker*, and *Nail*, the personnel decision here was not controlled by the Commonwealth of Virginia. Typically, [HN11] a state "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of [*660] the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1981). Because Dowe did not present sufficient evidence that the Commonwealth was involved in TAP's

145 F.3d 653, *; 1998 U.S. App. LEXIS 11631, **;
77 Fair Empl. Prac. Cas. (BNA) 151; 74 Empl. Prac. Dec. (CCH) P45,547

decision to terminate her employment, we do not believe that TAP can be described "in all fairness" as a state actor. Accordingly, the district court did not err in granting TAP's [**20]motion for summary judgment.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.
No. 83-18

SUPREME COURT OF THE UNITED STATES

472 U.S. 749; 105 S. Ct. 2939; 86 L. Ed. 2d 593; 1985 U.S.LEXIS 103; 53 U.S.L.W. 4866; 11 Media L. Rep. 2417

March 21, 1984, Argued
June 26, 1985, Decided

SUBSEQUENT HISTORY:

October 3, 1984, Reargued.

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF VERMONT.

DISPOSITION: 143 Vt. 66, 461 A. 2d 414, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: On certiorari from the Supreme Court of Vermont, petitioner challenged a ruling that that respondent did not need to show actual malice to recover presumed and punitive damages for petitioner's false and defamatory statements as petitioner was a nonmedia defendant and its alleged defamatory speech was not of public concern.

OVERVIEW: Petitioner, who was in the business of composing and selling financial reports about businesses, mistakenly reported that respondent had filed for bankruptcy. The report was sent to several of petitioner's subscribers. Petitioner issued a corrective statement, but refused to divulge the names of those that received the report. Respondent brought a defamation suit and the jury awarded respondent presumed and punitive damages. However, a new trial was ordered because the court was dissatisfied with its jury instructions regarding petitioner's knowledge of falsity or reckless disregard for the truth. The Supreme Court of Vermont reversed, holding that respondent was not required to show actual malice to recover presumed and punitive damages because petitioner was a nonmedia entity. On certiorari the Court affirmed, holding that respondent was not required to show actual malice to recover presumed and punitive damages because petitioner's false and defamatory speech was not a matter of public concern.

OUTCOME: Affirmed; because respondent was a private party, and because petitioner's false and defamatory statements against respondent did not involve matters of public concern, respondent was not required to show petitioner acted with actual malice when making the defamatory statements to recover presumed and punitive damages.

CORE TERMS: first amendment, punitive damages, presumed, libel, actual malice, reputation, defamation, reporting, malice, advertising, state interest, defamatory, media, public issues, nonmedia, subscribers, reckless disregard, common-law, matters of public concern, public official, subject matter, matter of public concern, commercial speech, fault, plurality opinion, falsity, robust, unrestrained, credit report, falsehood

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation
Torts: Defamation & Invasion of Privacy

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

[HN1] A public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation
Torts: Defamation & Invasion of Privacy

[HN2] It is speech on "matters of public concern" that is at the heart of U.S. Const. amend. I's protection.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN3] Speech on matters of purely private concern is of less U.S. Const. amend. I concern.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy

[HN4] In light of the reduced constitutional value of speech involving no matters of public concern, the state interest adequately supports awards of presumed and punitive damages -- even absent a showing of actual malice.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy

[HN5] Whether speech addresses a matter of public concern must be determined by the expression's content, form, and context as revealed by the whole record.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN6] Permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment, U.S. Const. amend. I, when the defamatory statements do not involve matters of public concern.

DECISION: Recovery of presumed and punitive damages in defamation cases without a showing of actual malice held not to violate First Amendment when defamatory statements do not involve matters of public concern.

SUMMARY: A construction contractor sued a credit reporting agency for defamation in a Vermont state court for circulating a false report that the contractor had filed for bankruptcy, an error which was found to have resulted from the mistaken attribution of a bankruptcy petition filed by a former employee of the contractor to the contractor itself. Following a jury verdict which found for the contractor and awarded both compensatory or presumed damages and punitive damages, the trial court ordered a new trial because of dissatisfaction with its instructions to the jury. The Supreme Court of Vermont reversed, holding that the rule of *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997, which held that the First Amendment prohibits awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows actual malice, and on which the credit agency had relied, was not applicable to defamation actions against "nonmedia" defendants such as the agency (143 Vt 66, 461 A2d 414).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, five members of the court agreed that the rule of *Gertz* does not apply where the false and defamatory statements involved do not involve matters of public concern. In addition, five members of the court agreed that in the area of defamation law, the rights of the institutional media under the First Amendment are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Powell, J., announced the judgment of the court and, in an opinion joined by Rehnquist and O'Connor, JJ., expressed the view that the First Amendment interest in speech of matters of purely private concern is less than that for matters of public concern, such as those which were involved in the *Gertz* case, and does not outweigh the state interest in awarding presumed and punitive damages for defamation.

Burger, Ch. J., concurred in the judgment, expressing the view that the *Gertz* decision should be overruled, and that, in any event, it was limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance.

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

White, J., concurred in the judgment, expressing the view that the Gertz decision should be overruled, and in any event should not be applied in this case because the defamatory publication involved did not deal with a matter of public importance; and also expressing the view that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech.

Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissented, expressing the view that the Gertz rule applies to any false statements regardless of whether or not they implicate a matter of public importance; and also expressing the view that the rights of the institutional media under the First Amendment are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

freedom of speech -- defamation -- presumed or punitive damages --

Headnote:

Permitting recovery of presumed and punitive damages in defamation cases in the absence of a showing of actual malice does not violate the First Amendment when the defamatory statements do not involve matters of public concern. [Per Powell, Rehnquist, and O'Connor, JJ., Burger, Ch. J., and White, J. Dissenting: Brennan, Marshall, Blackmun, and Stevens, JJ.]

[***HN2]

freedom of speech -- press rights -- defamation --

Headnote:

In the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. [Per White, Brennan, Marshall, Blackmun, and Stevens, JJ.]

SYLLABUS: Petitioner credit reporting agency sent a report to five subscribers indicating that respondent construction contractor had filed a voluntary petition for bankruptcy. The report was false and grossly misrepresented respondent's assets and liabilities. Thereafter, petitioner issued a corrective notice, but respondent was dissatisfied with this notice and brought a defamation action in Vermont state court, alleging that the false report had injured its reputation and seeking damages. After trial, the jury returned a verdict in respondent's favor and awarded both compensatory or presumed damages and punitive damages. But the trial court believed that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, controlled, and granted petitioner's motion for a new trial on the ground that the instructions to the jury permitted it to award damages on a lesser showing than "actual malice." The Vermont Supreme Court reversed, holding that *Gertz* was inapplicable to nonmedia defamation actions.

Held: The judgment is affirmed.

COUNSEL: Gordon Lee Garrett, Jr., reargued the cause for petitioner. With him on the briefs were Hugh M. Dorsey, Jr., David J. Bailey, William B. B. Smith, Peter J. Monte, and A. Buffum Lovell.

Thomas F. Heilmann reargued the cause and filed briefs for respondent. *

* Briefs of amici curiae urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by Robert M. Weinberg, George Kaufmann, and Laurence Gold; for Dow Jones & Co., Inc., by Robert D. Sack and Frederick T. Davis; for the Information Industry Association by Richard E. Wiley, Lawrence W. Secrest III, Michael Yourshaw, and Patricia M. Reilly; and for the Washington Post by David E. Kendall and Kevin T. Baine.

William E. Murane filed briefs for Sunward Corp. as amicus curiae urging affirmance.

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

JUDGES: JUSTICE POWELL, joined by JUSTICE REHNQUIST and JUSTICE O'CONNOR, concluded that: 1. The fact that the jury instructions in question referred to "malice," "lack of good faith," and "actual malice," did not require the jury to find "actual malice," as respondent contends, where the instructions failed to define any of these terms. Consequently, the trial court correctly concluded that the instructions did not satisfy Gertz. Pp. 753-755. 2. Permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Pp. 755-763. (a) In light of the reduced constitutional value of speech on matters of purely private concern, as opposed to speech on matters of public concern, the state interest in compensating private individuals for injury to their reputation adequately supports awards of presumed and punitive damages -- even absent a showing of "actual malice." Cf. Gertz. Pp. 755-761. (b) Gertz, *supra*, does not apply to this case. Petitioner's credit report concerned no public issue but was speech solely in the individual interest of the speaker and its specific business audience. This particular interest warranted no special protection when it was wholly false and damaging to the victim's business reputation. Moreover, since the credit report was made available to only five subscribers, who, under the subscription agreement, could not disseminate it further, it cannot be said that the report involved any strong interest in the free flow of commercial information. And the speech here, like advertising, being solely motivated by a desire for profit, is hardy and unlikely to be deterred by incidental state regulation. In any event, the market provides a powerful incentive to a credit reporting agency to be accurate, since false reporting is of no use to creditors. Pp. 761-763. THE CHIEF JUSTICE concluded that Gertz is inapplicable to this case, because the allegedly defamatory expression involved did not relate to a matter of public concern, and that no other reason was needed to dispose of the case. Pp. 763-764. JUSTICE WHITE concluded that Gertz should not be applied to this case either because Gertz should be overruled or because the defamatory publication in question did not deal with a matter of public importance. P. 774. POWELL, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST and O'CONNOR, JJ., joined. BURGER, C. J., post, p. 763, and WHITE, J., post, p. 765, filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, post, p. 774.

OPINIONBY: POWELL

OPINION: [*751] [***597] [**2941] JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE REHNQUIST and JUSTICE O'CONNOR joined.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names [***598] of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, [*752] to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

472 U.S. 749, *, 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz v. Robert Welch, Inc.*, supra, at 349, this Court had ruled broadly that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless [**2942] disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[because] of . . . dissatisfaction with its charge and . . . conviction that the interests of justice [required]" it. App. 26.

The Vermont Supreme Court reversed. 143 Vt. 66, 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants [*753] may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." Id., at 73, 461 A. 2d, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times [Co. v. Sullivan, 376 U.S. 254 (1964),]* and its progeny." Id., at 73-74, 461 A. 2d, at 417-418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" [***599] speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 75, 461 A. 2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." Ibid.

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply, n1 we granted certiorari. 464 U.S. 959 (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

-----Footnotes-----

n1 Compare *Denny v. Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U.S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges v. Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980) (same); *Rowe v. Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Ore. 361, 568 P. 2d 1359 (1977) (same), with *Antwerp Diamond Exchange, Inc. v. Better Business Bureau*, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

-----End Footnotes-----

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual [*754] malice" before awarding presumed or punitive damages. n2 The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, id., at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." Id., at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Id., at 18. Respondent contends that these references to "malice," "lack of good faith," and

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

"actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth -- the "actual malice" of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) -- before it awarded presumed or punitive damages.

-----Footnotes-----

n2 Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr v. Orr*, 440 U.S. 268, 274-275 (1979).

-----End Footnotes-----

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only [**2943] relevant term it defined was simple "malice." n3 And its definitions of this term included not only the *New York Times* formulation but also other concepts such as [*755] "bad faith" and "reckless disregard of the [statement's] possible consequences." App. 19. The [***600] instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

-----Footnotes-----

n3 The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice." App. 18-19 (emphasis added).

-----End Footnotes-----

III

In *New York Times Co. v. Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression upon public questions is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate on public issues should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that [HN1] a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e. g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.).

[*756] In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called *American Opinion*, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity [**2944] from liability." 418 U.S., at 343. [***601] Rather, they represented "an accommodation between [First Amendment] [concerns] and the limited state interest present in the context of libel actions brought by public persons." Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, id., at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." Id., at 348-349. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, [*757] however, indicated that this same balance would be struck regardless of the type of speech involved. n4

-----Footnotes-----

n4 The dissent states that "[at] several points the Court in Gertz makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." Post, at 785, n. 11. Given the context of Gertz, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving public speech. In fact, the dissent itself concedes that "Gertz . . . focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of public issues should mandate plaintiffs to show actual malice to obtain a judgment and actual damages" Post, at 777 (original emphasis).

The dissent also incorrectly states that Gertz "specifically held," post, at 779, 793, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . . ," post, at 779, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," post, at 793-794. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was "'unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, Gertz is consistent with the result we reach today.

-----End Footnotes-----

IV

We have never considered whether the Gertz balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." 418 U.S., at 348. A State should not lightly be required to abandon it,

"for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name [*758] 'reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' Rosenblatt v. Baer, 383 U.S. 75, 92 [***602] (1966) (concurring opinion)." Id., at 341.

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance. n5 [HN2] It is speech on [**2945] "matters of public concern" [*759] that is "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] is no mystery":

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). '[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed [***603] that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)."

In contrast, [HN3] speech on matters of purely private concern is of less First Amendment concern. *Id.*, at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. n6 In such a case,

[*760] "[there] is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; [**2946] and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Ore. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe v. Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny v. Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U.S. 883 (1982).

-----Footnotes-----

n5 This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942); cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-592 (1952) (advocating violent overthrow of the Government is unprotected speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (publication of troopship sailings during wartime may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, supra, at 456; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[numerous] examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, n. 19 (1964); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers -- all of whom speak for a living

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

-- is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas v. Collins*, 323 U.S. 516 (1945); see also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

n6 As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit" -- the case before us today -- "If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1268 (1983).

-----End Footnotes-----

While such speech is not totally unprotected by the First Amendment, see *Connick v. Myers*, supra, at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971); accord, *Rowe v. Metz*, supra, at 425-426, 579 P. 2d, at 84; Note, *Developments in the Law -- Defamation*, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances [*761] and publications. Restatement of Torts § 568, Comment b, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are [HN4] effective. In light of the [***604] reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages -- even absent a showing of "actual malice." n7

-----Footnotes-----

n7 The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of *Gertz*. Post, at 786. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." See post, at 794. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U.S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels -- no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

-----End Footnotes-----

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that [HN5] "[whether] . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, supra, at 147-148. [*762] These factors indicate that petitioner's credit report concerns no public issue. n8 It [**2947] was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times [***605] Co. v. Sullivan*, 376 U.S., at 270.

-----Footnotes-----

n8 The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, post, at 787, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

-----End Footnotes-----

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S., at 771-772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting [*763]agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance. n9

-----Footnotes-----

n9 The Court of Appeals for the Fifth Circuit has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (1973), cert. denied, 415 U.S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. 486 F.2d, at 32, and n. 18.

-----End Footnotes-----

VI

[**HR1A] We conclude that [HN6] permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

CONCURBY: BURGER; WHITE

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

CONCUR: CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

I dissented in *Gertz* because I believed that, insofar as the "ordinary private citizen" was concerned, 418 U.S., at 355, the Court's opinion "[abandoned] the traditional thread," *id.*, at 354-355, [**2948] that had been the theme of the law in this country [*764] up to that time. I preferred "to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry." *Ibid.* *Gertz*, however, is now the law of the land, and until it is overruled, it must, [***606] under the principle of stare decisis, be applied by this Court.

[***HR1B] The single question before the Court today is whether *Gertz* applies to this case. The plurality opinion holds that *Gertz* does not apply because, unlike the challenged expression in *Gertz*, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that *Gertz* is inapplicable in this case for the two reasons indicated. No more is needed to dispose of the present case.

I continue to believe, however, that *Gertz* was ill-conceived, and therefore agree with JUSTICE WHITE that *Gertz* should be overruled. I also agree generally with JUSTICE WHITE's observations concerning *New York Times Co. v. Sullivan*. *New York Times*, however, equates "reckless disregard of the truth" with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of *New York Times* in this way, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

Consideration of these issues inevitably recalls an aphorism of journalism that "too much checking on the facts has ruined many a good news story."

[*765] JUSTICE WHITE, concurring in the judgment.

Until *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.* § 569, Comment b, p. 166.

[***607] Similar rules applied to slanderous statements that were actionable per se. n1

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

-----Footnotes-----

n1 At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts § 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damages most often took the form of material or pecuniary loss. Id. § 575 and Comment b, pp. 185-187.

-----End Footnotes-----

[*766] [**2949] New York Times Co. v. Sullivan was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice," which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U.S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. Id., at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

In 1971, four Justices took the view that the New York Times rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. Rosenbloom v. Metromedia, Inc., 403 U.S. 29. That view did not command a majority. But in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault," at least negligence. Id., at 347, 350. Even with that proof, damages were not presumed but had to be proved. Id., at 349. Furthermore, no punitive damages were available without proof of New York Times malice. [*767] 418 U.S., at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in New York Times. I also joined later decisions extending the New York Times standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in Rosenbloom, and I dissented in Gertz, asserting that the common-law [***608] remedies should be retained for private plaintiffs. I remain convinced that Gertz was erroneously decided. I have also become convinced that the Court struck an improvident balance in the New York Times case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in Gertz: "[There] is no constitutional value in false statements of fact. Neither [**2950] the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S., at 340. Yet in New York Times cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no [*768] jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurrently happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of

472 U.S. 749, *, 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. n2 The public is [***609] left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment [*769] interests -- "it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." Rosenbloom, 403 U.S., at 46-47 (opinion of BRENNAN, J.); Gertz, supra, at 363-364 (BRENNAN, J., dissenting).

-----Footnotes-----

n2 If the plaintiff succeeds in proving a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name.

It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. But the logical consequence of that view is that the First Amendment forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false -- a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.

-----End Footnotes-----

Also, by leaving the lie uncorrected, the New York Times rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Gertz, supra, at 341, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The New York Times rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational [**2951] interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we cannot fairly be accused of giving constitutional protection to false information as such, for we went on to find competing and overriding constitutional justification for our decision. The constitutional interest in the flow of information about [*770] public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs were thought to require some breathing room -- that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread

472 U.S. 749, *, 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

false information, even [***610] though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the New York Times malice standard where the plaintiff is neither a public official nor a public figure, there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in Gertz about liability without fault and the unfairness of presuming damages, all of this, as was the case in New York Times, was done in the name of the First Amendment, purportedly to shield the press and others writing about public affairs from possibly intimidating [*771] damages liability. But if protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind New York Times and Gertz, it is evident that the Court engaged in severe overkill in both cases.

In New York Times, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in Rosenbloom, *supra*, at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in Gertz. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.

[**2952] We are not talking in these cases about mere criticism or opinion, but about misstatements of fact that seriously harm the reputation of another, by lowering him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts § 559 (1938). The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of [***611] fact. It could be suggested that even without the threat of large presumed and punitive damages awards, press defendants' communication [*772] will be unduly chilled by having to pay for the actual damages caused to those they defame. But other commercial enterprises in this country not in the business of disseminating information must pay for the damage they cause as a cost of doing business, and it is difficult to argue that the United States did not have a free and vigorous press before the rule in New York Times was announced. In any event, the New York Times standard was formulated to protect the press from the chilling danger of numerous large damages awards. Nothing in the central rationale behind New York Times demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about a public figure where the plaintiff cannot make out a jury case of actual malice.

I still believe the common-law rules should have been retained where the plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the Gertz premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set. n3

-----Footnotes-----

n3 The Court was unresponsive to my suggestion in dissent, 418 U.S., at 391-392, that the plaintiff should be able to prove and obtain a judgment of falsehood without having to establish any kind of fault.

-----End Footnotes-----

[***HR2A] It is interesting that JUSTICE POWELL declines to follow the Gertz approach in this case. I had thought that the decision in Gertz was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes Gertz as a case that involved a matter [*773] of public concern, an element absent here. Wisely, in my view, JUSTICE POWELL does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with JUSTICE BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. n4 It [**2953] should be [***612] rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If Gertz is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance, then where the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a nonmedia individual publishing privately. Although JUSTICE POWELL speaks only of the inapplicability of the Gertz rule with respect to presumed and [*774] punitive damages, it must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.

-----Footnotes-----

n4 We explained in *Branzburg v. Hayes*, 408 U.S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to nonmedia defendants. See *New York Times*, 376 U.S., at 254, n., 286; *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978). See also *Pell v. Procunier*, 417 U.S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

-----End Footnotes-----

As I have said, I dissented in Gertz, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert v. Lando*, 441 U.S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate. Moreover, since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them. In any event, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

[***HR1C] The question before us is whether Gertz is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the Gertz holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment.

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

DISSENTBY: BRENNAN

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to credit reporting -- a type of [***613]speech at some remove from that [*775] which first gave rise to explicit First Amendment restrictions on state defamation law -- and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice -- a clear and convincing showing of knowing falsehood or reckless disregard for the truth -- should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, ante, at 756-757, and reaffirms *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. Ante, at 755. JUSTICE WHITE also would affirm; [**2954] he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. Ante, at 774 (concurring in judgment). n1 THE CHIEF JUSTICE apparently agrees with JUSTICE WHITE. Ante, at 764 (concurring in judgment). The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the "central meaning of the First Amendment," 376 U.S., at 273, *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damages awards for this [*776] expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times Co. v. Sullivan* continue to command in the jurisprudence of this Court. See also *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485 (1984).

-----Footnotes-----

n1 JUSTICE WHITE also ventures some modest proposals for restructuring the First Amendment protections currently afforded defendants in defamation actions. JUSTICE WHITE agrees with *New York Times Co. v. Sullivan*, however, that the breathing space needed to ensure the robust debate of public issues essential to our democratic society is impermissibly threatened by unrestrained damages awards for defamatory remarks. Ante, at 770-772 (opinion concurring in judgment).

-----End Footnotes-----

I

In *New York Times Co. v. Sullivan* the Court held that the First Amendment shields all who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a public official. Recognizing that libel law, like all other governmental regulation of the content of speech, "can claim no talismanic immunity from constitutional limitations [and] must be measured by standards that satisfy the First Amendment," 376 U.S., at 269, the Court drew from salutary common-law developments, id., at 280, and n. 20, n2 [***614]and unquestioned First Amendment principles, id., at 273-274, to formulate the now-familiar actual malice test. Because the "erroneous statement is inevitable in free debate . . . [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, supra, [*777] at 271-272, quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963); see *Bose Corp.*, supra, at 513. These solidly accepted principles are not at issue today.

-----Footnotes-----

n2 The principles were expressed as early as 1788 in an opinion of the Pennsylvania Supreme Court:

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

"What then is the meaning of the bill of rights, and Constitution of Pennsylvania, when they declare, 'That the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?' . . . [They] give to every citizen a right of investigating the conduct of those who are entrusted with the public business The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." *Respublica v. Oswald*, 1 Dall. 319, 325 (footnotes omitted).

----- -End Footnotes- -----

Our First Amendment libel decisions in the last two decades have in large measure been an effort to explore the full ramifications of the *New York Times Co. v. Sullivan* principles. Building on the extension of actual malice to "public figure" plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and *Gertz v. Robert Welch, Inc.*, *supra*, focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of public issues should mandate plaintiffs to show actual malice to obtain a judgment and actual damages; the Court settled on a rule requiring actual malice as a prerequisite to recovery only in suits brought by public officials or public [**2955] figures. 418 U.S., at 344-346. n3 We have also recognized, however, that the First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues. See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for free speech and press are not the preserve [***615] of political expression or comment upon public affairs, essential as those are to healthy government"); cf. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

----- -Footnotes- -----

n3 A plurality in *Rosenbloom* would have applied the actual malice standard of liability when the alleged libel concerned matters of "public or general interest," irrespective of the status of the plaintiff. 403 U.S., at 43 (opinion of BRENNAN, J.). In *Gertz* the Court rejected the *Rosenbloom* plurality's "public or general interest" approach. That approach was thought unacceptably to impair the reputational interests of private individuals, who, unlike public officials or public figures, neither assume the risk of rough treatment by entering the public arena nor have ready access to the media to rebut false charges. 418 U.S., at 344-345. It was also thought to "occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest.'" *Id.*, at 346 (citation omitted).

----- -End Footnotes- -----

[*778] Our cases since *New York Times Co. v. Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment. 376 U.S., at 269. In this sense defamation law does not differ from state efforts to control obscenity, see *Miller v. California*, 413 U.S. 15, 23-24 (1973), ensure loyalty, see *Speiser v. Randall*, 357 U.S. 513 (1958), protect consumers, see *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), oversee professions, see *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), or pursue other public welfare goals through content-based regulation of speech. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall*, *supra*, at 520. This general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

472 U.S. 749, *, 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

In libel law, no less than any other governmental effort to regulate speech, States must therefore use finer instruments to ensure adequate space for protected expression. Cf. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 565 (1980) (restriction "may extend only so far as the interest it serves"); *Lowe v. SEC*, ante, at 234 (WHITE, J., concurring in judgment) ("[The] First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest"). The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle, even when the alleged libel does not implicate directly the type of speech at issue in *New York Times Co. v. [**779]Sullivan*. Justice Harlan made precisely this point in *Rosenbloom*:

"At a minimum, even in the purely private libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection [**2956] by the First Amendment." 403 U.S., at 73 (dissenting opinion) (emphasis added).

See also *id.*, at 65; [***616] *New York Times Co. v. Sullivan*, 376 U.S., at 269.

Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*. Requiring "that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved," the Court found it "necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 U.S., at 349. The Court explained that state rules authorizing presumed and punitive damages conferred on juries "largely uncontrolled discretion" to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 349-350. Punitive damages in particular were found to be "wholly irrelevant to the state interest" because "[they] are not compensation for injury." *Id.*, at 350 (emphasis added). For these reasons, the Court in *Gertz* specifically held that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons: the common-law approach, said the Court, "unnecessarily compounds the [*780]potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.*, at 349 (emphasis added). n4

-----Footnotes-----

n4 Since the decision in *Gertz*, we have applied its reasoning with respect to damages in excess of compensation for actual harm in other areas of the law. See, e. g., *Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981). These cases, like *Gertz*, recognize that "the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs -- such as the encouragement of unnecessary litigation and the chilling of desirable conduct -- flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (REHNQUIST, J., dissenting). See *id.*, at 46-47 (Court opinion) (noting prevailing view that punitive damages may only be awarded for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others," quoting Restatement (Second) of Torts § 908(2) (1979) (emphasis deleted)); 461 U.S., at 93-94 (O'CONNOR, J., dissenting); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 244-245 (1984); *id.*, at 260-261 (BLACKMUN, J., dissenting); *id.*, at 276 (POWELL, J., dissenting).

-----End Footnotes-----

Thus, when an alleged libel involves criticism of a public official or a public figure, the need to nurture robust debate of public issues and the requirement that all state regulation of speech be narrowly tailored coalesce to require actual malice as a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits States significant leeway to compensate for actual damage to reputation. n5 The [***617] requirement of narrowly tailored [*781] regulatory measures, however, always

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. It has remained the judgment of the Court since *Gertz* that this comprehensive two-tiered structure best accommodates the values of the constitutional free speech guarantee [**2957] and the States' interest in protecting reputation.

-----Footnotes-----

n5 Such speech might at times involve issues of public or general interest within the meaning of *Rosenbloom* and thus implicate important First Amendment interests. To justify this cost, the Court in *Gertz* held that the State had an enhanced interest in protecting private reputation and cited the independent First Amendment difficulties inherent in case-by-case judicial determination of whether speech concerns a matter of public interest. 418 U.S., at 344-346. See n. 3, *supra*. The decision in *Gertz* is also susceptible of an alternative justification. Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures. In light of the problems inherent in case-by-case judicial determination of what is in the public interest, the Court's result could be explained as a decision that the cost of case-by-case evaluation could be avoided without significant chilling of speech involving matters of public importance.

-----End Footnotes-----

II

The question presented here is narrow. Neither the parties nor the courts below have suggested that respondent *Greenmoss Builders* should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible. *Gertz* provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of JUSTICE POWELL and JUSTICE WHITE have cut away the protective mantle of *Gertz*.

A

Relying on the analysis of the Vermont Supreme Court, respondent urged that this pruning be accomplished by restricting the applicability of *Gertz* to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[the] inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). [*782] First Amendment difficulties lurk in the definitional questions such an approach would generate. n6 And the distinction would [***618] likely be born an anachronism. n7 [*783] Perhaps most importantly, the argument that *Gertz* should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. n8 This solicitude [**2958] implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, *supra*, at 784-785. See *Bridges v. California*, 314 U.S. 252, 277-278 (1941).

-----Footnotes-----

n6 An attempt to characterize petitioner *Dun & Bradstreet* illustrates the point. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

information to a limited number of subscribers who have paid substantial fees for [its] services." 143 Vt. 66, 73, 461 A. 2d 414, 417 (1983). The court added that "[there] is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." Ibid.

No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest, and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

n7 Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." Pool, *The New Technologies: Promise of Abundant Channels at Lower Cost*, in *What's News: The Media in American Society* 81, 87 (1981). See also I. Pool, *Technologies of Freedom* (1983); U.S. Federal Trade Commission, *Media Policy Session: Technology and Legal Change* (1979); Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong., 1st Sess. (Comm. Print 1981).

n8 See, e. g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 395 (1981); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936). See also *Herbert v. Lando*, 441 U.S. 153, 180-199 (1979) (BRENNAN, J., dissenting in part); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); Stewart, "Or of the Press," 26 *Hastings L. J.* 631 (1975).

-----End Footnotes-----

[***HR2B] The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. See, e. g., *Carey v. Brown*, 447 U.S. 455, 459-463 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring). This guarantee also protects the rights of listeners to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). n9 Accordingly, at least six [*784]Members of this [***619] Court (the four who join this opinion and JUSTICE WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. See ante, at 773 (opinion concurring in judgment). n10

-----Footnotes-----

n9 In light of the "increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," Gertz, 418 U.S., at 402 (WHITE, J., dissenting), protection for the speech of nonmedia defendants is essential to ensure a diversity of perspectives. See J. Barron, *Freedom of the Press for Whom?* (1973). "[Uninhibited], robust and wide-open" debate, *New York Times Co. v. Sullivan*, 376 U.S., at 270, among nonmedia

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, *The Effects of Mass Communications* (1960).

n10 JUSTICE POWELL's opinion does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case.

-----End Footnotes-----

B

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of *Gertz*. Arguing that at most *Gertz* should protect speech that "deals with a matter of public or general importance," ante, at 773, JUSTICE WHITE, without analysis or explanation, decides that the credit report at issue here falls outside this protected category. The plurality opinion of JUSTICE POWELL offers virtually the same conclusion with at least a garnish of substantive analysis.

Purporting to "employ the approach approved in *Gertz*," ante, at 757, JUSTICE POWELL balances the state interest in protecting private reputation against the First Amendment interest in protecting expression on matters not of public concern. The state interest is found to be identical to that at stake in *Gertz*. The First Amendment interest is, however, found to be significantly weaker because speech on public issues, such as that involved in *Gertz*, receives greater constitutional protection than speech that is not a matter of public concern. See ante, at 759-760, citing [*785] *Connick v. Myers*, 461 U.S. 138 (1983). JUSTICE POWELL is willing to concede that such [**2959] speech receives some First Amendment protection, but on balance finds that such protection does not reach so far as to restrain the state interest in protecting reputation through presumed and punitive damages awards in state defamation actions. Ante, at 760-761. Without explaining what is a "matter of public concern," the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not, ante, at 761-762, and on this basis affirms the Vermont courts' award of presumed and punitive damages.

In professing allegiance to *Gertz*, the plurality opinion protests too much. As JUSTICE WHITE correctly observes, JUSTICE POWELL departs completely from the analytic framework and result of that case: "*Gertz* was intended to reach cases that involve any false statements . . . whether or not [they] [implicate] a matter of public importance." Ante, at 772 (concurring [***620] in judgment). n11 Even accepting the notion that a distinction can and should be drawn between matters [*786] of public concern and matters of purely private concern, however, the analyses presented by both JUSTICE POWELL and JUSTICE WHITE fail on their own terms. Both, by virtue of what they hold in this case, propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles. The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*. Were this speech appropriately characterized as a matter of only private concern, moreover, the elimination of the *Gertz* restrictions on presumed and punitive damages would still violate basic First Amendment requirements.

-----Footnotes-----

n11 One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach. 418 U.S., at 346. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern. At several points the Court in *Gertz* makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases. *Id.*, at 346, 349-350.

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

Indeed, JUSTICE POWELL's opinion today is fairly read as embracing the approach of the Rosenbloom plurality to deciding when the Constitution should limit state defamation law. The limits imposed, however, are less stringent than those suggest by the Rosenbloom plurality. Under the approach of today's plurality, speech about matters of public or general interest receives only the Gertz protections against unrestrained presumed and punitive damages, not the full *New York Times Co. v. Sullivan* protections against any recovery absent a showing of actual malice.

-----End Footnotes-----

(1)

The five Members of the Court voting to affirm the damages award in this case have provided almost no guidance as to what constitutes a protected "matter of public concern." JUSTICE WHITE offers nothing at all, but his opinion does indicate that the distinction turns on solely the subject matter of the expression and not on the extent or conditions of dissemination of that expression. Ante, at 773. JUSTICE POWELL adumbrates a rationale that would appear to focus primarily on subject matter. n12 The opinion relies on the fact that the speech at issue was "solely in the individual interest of the speaker and its specific business audience," ante, at 762 (emphasis added). Analogizing explicitly to advertising, [*787] the opinion also states that credit reporting is "hardy" and "solely motivated by the desire for profit." Ibid. [**2960] These two strains of analysis suggest [***621] that JUSTICE POWELL is excluding the subject matter of credit reports from "matters of public concern" because the speech is predominantly in the realm of matters of economic concern.

-----Footnotes-----

n12 JUSTICE POWELL also appears to rely in part on the fact that communication was limited and confidential. Ante, at 762. Given that his analysis also relies on the subject matter of the credit report, ante, at 761-762, it is difficult to decipher exactly what role the nature and extent of dissemination plays in JUSTICE POWELL's analysis. But because the subject matter of the expression at issue is properly understood as a matter of public concern, see *infra*, at 791-793, it may well be that this element of confidentiality is crucial to the outcome as far as JUSTICE POWELL's opinion is concerned. In other words, it may be that JUSTICE POWELL thinks this particular expression could not contribute to public welfare because the public generally does not receive it. This factor does not suffice to save the analysis. See n. 18, *infra*.

-----End Footnotes-----

In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, e. g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952); *American Federation of Labor v. Swing*, 312 U.S. 321, 325-326 (1941); *Thornhill v. Alabama*, 310 U.S. 88, 101-103 (1940); see also *Abood v. Detroit Board of Education*, 431 U.S., at 231-232, and n. 28. "[Our] cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protection." *Id.*, at 231. The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S., at 503-504; *Whitney v. California*, 274 U.S., at 375 (Brandeis, J., concurring).

Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," 376 U.S., at 273, is an important part of our public discourse. The Court made clear in the context of discussing labor relations speech in *Thornhill v. Alabama*, *supra*:

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

"It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the [*788] present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U.S., at 102-103.

As Thornhill suggests, the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us. See *id.*, at 102 ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members [***622] of society to cope with the exigencies of their period"). n13

-----Footnotes-----

n13 Similarly, we have rejected the arguments for denying or restricting First Amendment protection of advertising on the ground that advertising is not a matter of public concern. Recognizing that even pure advertising may well be affected with a public interest, we have stated that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how [our economic] system ought to be regulated or altered." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). See also *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) ("Viewed in its entirety the [abortion] advertisement conveyed information of potential interest and value to a diverse audience -- not only to readers possibly in need of the services offered"). The potential political aspect of attempts to influence consumer preferences has also been recognized. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 538-539 (1981) (BRENNAN, J., concurring in judgment) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot -- do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). The greater state latitude for regulating commercial advertising is instead a function of "greater objectivity and hardiness." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, *supra*, at 772, n. 24.

-----End Footnotes-----

[*789] [**2961] The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," *ante*, at 762, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Bd.*, 425 U.S., at 761. See also *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, *supra*, at 501. More importantly, an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in *Thornhill*, such a bankruptcy "in a single factory may have economic repercussions upon a whole region." And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions. n14

-----Footnotes-----

472 U.S. 749, *, 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

n14 JUSTICE POWELL purports to draw from *Connick v. Myers*, 461 U.S. 138 (1983), a test for distinguishing matters of public concern from matters of private concern. This reliance perpetuates a definition of "public concern" wholly out of accord with our consistent precedents and with the common-law understanding of the concept. See *id.*, at 165, n. 5 (BRENNAN, J., dissenting). Moreover, *Connick* explicitly limited its distinction between public and private concern to the "context" of a government employment situation. *Id.*, at 148, and n. 8.

-----End Footnotes-----

[*790] (2)

***623] Even if the subject matter of credit reporting were properly considered -- in the terms of JUSTICE WHITE and JUSTICE POWELL -- as purely a matter of private discourse, this speech would fall well within the range of valuable expression for which the First Amendment demands protection. Much expression that does not directly involve public issues receives significant protection. Our cases do permit some diminution in the degree of protection afforded one category of speech about economic or commercial matters. "Commercial speech" -- defined as advertisements that "[do] no more than propose a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) -- may be more closely regulated than other types of speech. Even commercial speech, however, receives substantial First Amendment protection. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, *supra*, at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable"). Credit reporting is not "commercial speech" as this Court has defined the term. Even if credit reporting were so considered, it would still be entitled to the substantial protections the First Amendment affords that category. See *Zauderer*, 471 U.S., at 637; *id.*, at 657-658 (BRENNAN, J., concurring in part and dissenting in part). Under either view, the [*2962] expression at issue in this case should receive protection from the chilling potential of unrestrained presumed and punitive damages awards in defamation actions.

[*791] Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S., at 20. The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being. Justice Douglas made precisely this point:

"The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general [*624] allocation of resources. . . .

"The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905-906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[presumably] the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In every case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated [*792] was pure advertising -- an offer to buy or sell goods and services or encouraging such buying and selling. n15 Credit reports are not commercial advertisements for a

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardly dissipates rapidly when the speech is not advertising. Compare *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), with *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530 (1980).

-----Footnotes-----

n15 See, e. g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Bolger v. Young Products Corp.*, 463 U.S. 60 (1983) (contraceptive advertising); *In re R. M. J.*, 455 U.S. 191 (1982) (lawyer advertising); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) (advertising of electricity); *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrist advertising); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (lawyer's solicitation of business); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising).

-----End Footnotes-----

It is worth noting in this regard that the common law of most States, although apparently not of Vermont, 143 Vt. 66, 76, 461 A. 2d 414, 419 (1983), recognizes a qualified privilege for reports like that at issue here. See Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L. J. 95, 99-105 (1983). The privilege typically precludes recovery for false and defamatory credit information without [***2963] a showing of bad faith or malice, a standard of proof which is often defined according to the New York Times formulation. See, e. g., *Datacon, Inc. v. Dun & Bradstreet, Inc.*, 465 F.Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect.

[*793] Even if JUSTICE POWELL's characterization of the credit reporting at [***625] issue here were accepted in its entirety, his opinion would have done no more than demonstrate that this speech is the equivalent of commercial speech. The opinion, after all, relies on analogy to advertising. Credit reporting is said to be hardy, motivated by desire for profit, and relatively verifiable. Ante, at 762. But this does not justify the elimination of restrictions on presumed and punitive damages. State efforts to regulate commercial speech in the form of advertising must abide by the requirement that the regulatory means chosen be narrowly tailored so as to avoid any unnecessary chilling of protected expression. See *Zauderer*, supra; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, supra; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, supra. n16

-----Footnotes-----

n16 Indeed JUSTICE POWELL has chosen a particularly inapt set of facts as a basis for urging a return to the common law. Though the individual's interest in reputation is certainly at the core of notions of human dignity, ante, at 757-758, citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); see *Paul v. Davis*, 424 U.S. 693, 714 (1976) (BRENNAN, J., dissenting), the reputational interest at stake here is that of a corporation. Similarly, that this speech is solely commercial in nature undercuts the argument that presumed damages should be unrestrained in actions like this one because actual harm will be difficult to prove. If the credit report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, an alleged libel concerning a bank's customer may cause the bank to lower the credit limit or raise the interest rate charged that customer. The commercial context does not increase the need for presumed damages, but if anything reduces the need to presume harm. At worst the commercial damages caused by such action should be no more difficult to ascertain than many other traditional elements of tort damages. See, e. g., *Russell v. City of Wildwood*, 428 F.2d 1176, 1181 (CA3 1970) (future earnings); *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering).

-----End Footnotes-----

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

The Court in *Gertz* specifically held that unrestrained presumed and punitive damages were "unnecessarily" broad, [*794] 418 U.S., at 350, in relation to the legitimate state interests. Indeed, *Gertz* held that in a defamation action punitive damages, designed to chill and not to compensate, were "wholly irrelevant" to furtherance of any valid state interest. *Ibid.* The Court did not reach these conclusions by weighing the strength of the state interest against the strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted. The plurality opinion today recognizes, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. What was "irrelevant" in *Gertz* must still be irrelevant, and the requirement that the regulatory means be no broader than necessary is no less applicable even if the speech is simply the equivalent of commercial speech. Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of First Amendment guarantees. n17

-----Footnotes-----

n17 JUSTICE POWELL's analysis fails to apply the requirement that regulation be narrowly tailored. At one point the opinion reads: "This particular interest [in credit reporting] warrants no special protection when . . . the speech is wholly false and clearly damaging to the victim's business reputation." *Ante*, at 762. The point, of course, is not that false speech intrinsically deserves protection, see *Gertz*, 418 U.S., at 340, but that the burdening of unintentional false speech potentially chills truthful speech. Thus, the state interest in compensating injury resulting from false speech must be vindicated by means that are narrowly tailored to avoid this deleterious result.

-----End Footnotes-----

(3)

[**626] Even if not at "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), the expression at issue in this [**2964] case is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. See *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530 (1980). Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damages awards. n18

-----Footnotes-----

n18 JUSTICE POWELL also relies in part on the fact that the expression had a limited circulation and was expressly kept confidential by those who received it. Because the subject matter of the expression at issue in this case would clearly receive the comprehensive protections of *Gertz* were the speech publicly disseminated, this factor of confidential circulation to a limited number of subscribers is perhaps properly understood as the linchpin of JUSTICE POWELL's analysis. See *ante*, at 762 (because of confidentiality "it cannot be said that the report involves any 'strong interest in the free flow of commercial information'" (plurality opinion) (citation omitted). See also n. 12, *supra*.

This argument does not save the analysis. The assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979). Perhaps more importantly, *Dun & Bradstreet* doubtless provides thousands of credit reports to thousands of subscribers who receive the information pursuant to the same strictures imposed on the recipients in this case. As a systemic matter, therefore, today's decision diminishes the free flow of information because *Dun & Bradstreet* will generally be made more reticent in providing information to all its subscribers.

-----End Footnotes-----

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

Of course, the commercial context of Dun & Bradstreet's reports is relevant to the constitutional analysis insofar as it implicates the strong state interest "in protecting consumers and regulating commercial transactions," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978). Cf. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 81 (1983) (STEVENSON, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify appropriate [*796] regulation designed to prevent the social losses caused by false credit reports. n19 And in the libel context, the [***627] States' regulatory interest in protecting reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damages awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, Greenmoss Builders should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages. Because the jury was not instructed in accordance with these principles, we would reverse and remand for further proceedings not inconsistent with this opinion.

-----Footnotes-----

n19 See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 126 (1983):

"Under Gertz, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 1681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the Gertz requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to Gertz's malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of Gertz. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

-----End Footnotes-----

REFERENCES:

Free speech and press clauses of Federal Constitution's First Amendment as affecting damages recoverable for defamation--Supreme Court cases

50 Am Jur 2d, Libel and Slander 96, 97, 102, 298-302, 350, 352, 353

16 Am Jur Pl & Pr Forms (Rev), Libel and Slander Forms 1-4, 24, 111, 251, 283, 294, 311-314

14 Am Jur Proof of Facts 2d 49, Defamation with Actual Malice

19 Am Jur Trials 499, Defamation

USCS Constitution, 1st Amendment

US L Ed Digest, Constitutional Law 927, 947

L Ed Index to Annos, Freedom of Speech, Press, Religion, and Assembly; Libel and Slander

ALR Quick Index, Commercial Defamation; Freedom of Speech and Press; Libel and Slander; New York Times Rule

Federal Quick Index, Freedom of Speech and Press; Libel and Slander; New York Times Rule

Annotation References:

472 U.S. 749, *; 105 S. Ct. 2939, **;
86 L. Ed. 2d 593, ***; 1985 U.S. LEXIS 103

Progeny of New York Times v Sullivan in the Supreme Court. 61 L Ed 2d 975.

Constitutional aspects of libel and slander. 28 L Ed 2d 885.

Who is a "public figure" in light of Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997. 75 ALR3d 616.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

Sufficiency of showing of malice or lack of reasonable care to support credit agency's liability for circulating inaccurate credit report. 40 ALR3d 1049.

Libel and slander: Who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. 19 ALR3d 1361.

THADDEUS DONALD EDMONSON, PETITIONER v. LEESVILLE CONCRETECO., INC.
No. 89-7743

SUPREME COURT OF THE UNITED STATES

500 U.S. 614; 111 S. Ct. 2077; 114 L. Ed. 2d 660; 1991 U.S.LEXIS 3023; 59 U.S.L.W. 4574; 91 Cal. Daily Op.
Service 4094; 91 Daily JournalDAR 6423

January 15, 1991, Argued
June 3, 1991, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 895 F. 2d 218, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner worker appealed an order from the United States Court of Appeals for the Fifth Circuit denying the worker's request that respondent company state a race-neutral reason when using peremptory challenges to dismiss potential jurors in the worker's civil action against the company.

OVERVIEW: The worker filed suit against the company for negligence. At trial, the worker's request that the company articulate race-neutral reasons for using its peremptory challenges was denied. On appeal, the judgment was affirmed. The appellate court held that use of peremptory challenges in civil suits did not constitute state action, and did not implicate constitutional guarantees. The Supreme Court reversed, holding that peremptory challenges were only permitted when a statute or law allowed them. Use of peremptory challenges involved significant state action because they were not exercised without overt, significant assistance from the trial court. The trial court summoned and discharged jurors, and exerted control over the voir dire system. The use of peremptory challenges involved the traditional government function of conducting a trial. The worker had standing to assert the rights of potential jurors because the worker was directly injured by the dismissals, and the task of jurors asserting their own rights was daunting.

OUTCOME: The Court reversed, holding that significant state action existed in a civil trial when the private company used peremptory challenges to dismiss jurors based on race, and the worker had standing to file suit.

CORE TERMS: peremptory, juror, peremptory challenge, state action, courtroom, jury service, private parties, adversarial, overt, race-based, equal protection, jury selection, civil trial, voir dire, discriminatory, racial discrimination, public defender, state actor, civil case, account of race, government function, petit jury, performing, racially, color of state law, qualification, attributed, excused, entity, notice

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Equal Protection: Race

Criminal Law & Procedure: Juries & Jurors: Challenges to Jury Venire: Equal Protection Challenges

[HN1] The Supreme Court holds that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury.

Constitutional Law: Equal Protection: Race

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

[HN2] The United States Constitution's protections of individual liberty and equal protection apply in general only to action by the government. Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN3] Although the conduct of private parties lies beyond the United States Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Generally

Constitutional Law: Procedural Due Process: Scope of Protection

[HN4] When the Supreme Court considers the state-action question in the context of a due process challenge to a state's procedure allowing private parties to obtain prejudgment attachments, the Court asks first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

Civil Procedure: Jury Trials: Jury Selection

Criminal Law & Procedure: Juries & Jurors: Peremptory Challenges

[HN5] Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN6] In determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN7] The Supreme Court finds state action when private parties make extensive use of state procedures with the overt, significant assistance of state officials.

Constitutional Law: Equal Protection: Race

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Generally

[HN8] If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality.

Civil Procedure: Justiciability: Standing

Constitutional Law: The Judiciary: Case or Controversy: Third Party Standing

[HN9] In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. However, this fundamental restriction on judicial authority admits of certain, limited exceptions, and a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests.

Constitutional Law: The Judiciary: Case or Controversy: Standing

Criminal Law & Procedure: Juries & Jurors: Challenges to Jury Venire: Equal Protection Challenges

[HN10] The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice.

DECISION: In civil jury trial in Federal District Court, equal protection component of Fifth Amendment's due process clause held to prohibit private litigant's use of peremptory challenges based on race.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

SUMMARY: In *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, which involved a black defendant in a state criminal case, the United States Supreme Court held that the equal protection clause of the Federal Constitution's Fourteenth Amendment would be violated by a prosecutor's purposefully discriminatory exercise of peremptory challenges to remove from a jury venire members of the defendant's own race. Subsequently, in *Powers v Ohio* (1991) 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364, which involved a white defendant in a state criminal case, the Supreme Court--in holding that a defendant may object to a prosecutor's allegedly race-based peremptory challenges regardless of whether the defendant and the excluded jurors share the same race--determined that such a defendant has third-party standing to raise the equal protection claims of the excluded jurors. A black construction worker who had been injured in a job-site accident at a federal enclave brought a negligence suit against a concrete company in the United States District Court for the Western District of Louisiana. When the company used two of its three peremptory challenges to remove black prospective jurors, the District Court rejected the worker's objections based on *Batson v Kentucky* and expressed the view that *Batson v Kentucky* did not apply in civil proceedings. Eventually, a jury of 11 whites and one black returned a verdict for the worker and assessed his total damages at \$90,000, but attributed 80 percent of the fault to the worker's own contributory negligence, so that the net award was only \$18,000. On appeal by the worker, a panel of the United States Court of Appeals for the Fifth Circuit, reversing and ordering a remand, expressed the view that peremptory challenges could not be used in a civil trial for the purpose of excluding jurors based on race (860 F2d 1308). On rehearing en banc, however, the Court of Appeals affirmed the District Court's judgment and expressed the view that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications, because the use of peremptory challenges by private litigants (1) does not constitute state action; and (2) thus, does not implicate federal constitutional guarantees (895 F2d 218).

On certiorari, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Kennedy, J., joined by White, Marshall, Blackmun, Stevens, and Souter, JJ., it was held that, under the equal protection component of the due process clause of the Constitution's Fifth Amendment, a private litigant in a civil case which originates in a United States District Court may not use peremptory challenges to exclude prospective jurors on account of their race, because (1) such a race-based exclusion through the use of peremptory challenges violates the equal protection rights of the excluded jurors, for (a) discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than such discrimination in a criminal trial, and (b) such a peremptory-challenge exclusion is pursuant to a course of state--that is, government--action for constitutional purposes, since (i) there is statutory authorization for the challenges exercised, and the claimed constitutional deprivation thus has its source in state authority, and (ii) the private litigant in all fairness must be deemed a governmental actor in such circumstances; (2) an opposing litigant has third-party standing to raise the excluded jurors' rights in the opposing litigant's own behalf; and (3) while the role of litigants in determining a jury's composition may provide one reason for wide acceptance of the jury system and of its verdicts, if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.

O'Connor, J., joined by Rehnquist, Ch. J., and Scalia, J., dissenting, expressed the view that (1) as much as it would be desirable to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly, because the Fifth Amendment's due process clause prohibits only action for which the government is responsible; and (2) a peremptory strike by a private litigant is fundamentally a matter of private choice rather than state action.

Scalia, J., dissenting, expressed the view that the opinion of O'Connor, J., demonstrated that the court's decision was wrong in principle, and the court's decision would also be unfortunate in its consequences, because the decision, when combined with the prior decision in *Powers v Ohio*, (1) added another level of complexity to an already complex system of justice; and (2) meant that either (a) the amount of judges' and lawyers' time devoted to implementing the court's newly discovered law of the land would be enormous, or (b) the states and Congress would abolish peremptory challenges, which would cause justice to suffer in a different fashion.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

peremptory challenges by private litigant -- federal civil case -- race discrimination -- due process --

Headnote:

Under the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment, a private litigant in a civil case which originates in a United States District Court may not use peremptory challenges to exclude prospective jurors on account of their race, because (1) such a race-based exclusion through the use of peremptory challenges violates the equal protection rights of the excluded jurors, for (a) discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than such discrimination in a criminal trial, since, in either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in the nation's system of justice, and (b) such a peremptory-challenge exclusion is pursuant to a course of state--that is, government--action for constitutional purposes, since (i) there is statutory authorization for the challenges exercised, and the claimed constitutional deprivation thus has its source in state authority, and (ii) the private litigant in all fairness must be deemed a governmental actor in such circumstances; (2) an opposing litigant has third-party standing to raise the excluded jurors' rights in the opposing litigant's own behalf; and (3) while the role of litigants in determining a jury's composition may provide one reason for wide acceptance of the jury system and of its verdicts, if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution, where (a) other means exist for litigants to satisfy themselves of a jury's impartiality, (b) whether a race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden fear, neither motive entitles a litigant to cause injury to the excluded juror, and (c) if a litigant believes that a prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color. (O'Connor, J., Rehnquist, Ch. J., and Scalia, J., dissented from this holding.)

[***HN2]

extent of rights -- government action -- private sphere -- equal protection --

Headnote:

A determination that an act violates the Federal Constitution when committed by a government official does not answer the question whether the same act offends federal constitutional guarantees if committed by a private litigant or the litigant's attorney; the Constitution's guarantees of individual liberty and equal protection apply in general only to action by the government, and with a few exceptions, such as the provisions of the Thirteenth Amendment, do not apply to the actions of private entities; such a fundamental limitation on the scope of constitutional guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the state, its agencies, or officials responsibility for conduct for which they cannot be blamed; one great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law; the courts, in order to implement these principles, must consider from time to time where the governmental sphere ends and the private sphere begins; although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that the participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints; this is the jurisprudence of state action, which explores the essential dichotomy between the private sphere and the public sphere, with all its attendant constitutional obligations.

[***HN3]

racial discrimination --

Headnote:

Racial discrimination, though invidious in all contexts, violates the Federal Constitution only when the discrimination may be attributed to state action.

500 U.S. 614, *, 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

[***HN4]

restrictions --

Headnote:

The Federal Constitution structures the national government and confines its actions, and, in regard to certain individual liberties and other matters, confines the actions of the states.

[***HN5]

peremptory challenges -- race discrimination -- due process -- state authority --

Headnote:

With respect to a claim that in a civil case which originates in a United States District Court, a private litigant's use of peremptory challenges to exclude prospective jurors on account of their race violates the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment, the claimed constitutional deprivation has its source in state--that is, government--authority, because (1) peremptory challenges, by their very nature, have no significance outside a court of law; (2) legislative authorizations, as well as limitations, for the use of peremptory challenges date back as far as the founding of the republic; (3) the common-law origins of peremptories predate that; and (4) without the peremptory-challenge authorization granted by an act of Congress (28 USCS 1870), a private litigant in such a case would not be able to engage in the alleged discriminatory acts.

[***HN6]

peremptory challenges -- race discrimination -- due process -- government actor --

Headnote:

In a civil case which originates in a United States District Court, a private litigant must in all fairness be deemed a government actor, for purposes of the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment, when the litigant exercises peremptory challenges to exclude prospective jurors on account of their race, because (1) a private party could not exercise peremptory challenges absent the overt, significant assistance of the court, given that (a) under federal statutes (18 USCS 243; 28 USCS 1861-1865, 1871), the government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination, (b) the party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the final and practical denial of the excluded individual's opportunity to serve on the petit jury, (c) without the direct and indispensable participation, under 28 USCS 1870 and under court rules, including Rule 47 of the Federal Rules of Civil Procedure, of the judge--who is a state actor--the peremptory challenge system would serve no purpose, (d) the court, by enforcing the peremptory challenge system, not only has made itself a party to the biased act, but also has elected to place the court's power, property, and prestige behind the alleged discrimination, and (e) the government, in so doing, has created the legal framework governing the challenged conduct and, in a significant way, has involved itself with invidious discrimination; (2) the selection of jurors represents a unique government function delegated to private litigants by the government and attributable to the government for constitutional purposes; and (3) the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse, since (a) few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

unfolds, (b) race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there, and (c) racial bias mars the integrity of the judicial process and prevents the idea of democratic government from becoming a reality. (O'Connor, J., Rehnquist, Ch. J., and Scalia, J., dissented from this holding.)

[***HN7]

peremptory challenges --

Headnote:

The sole purpose of peremptory challenges is to permit litigants to assist the government in the selection of an impartial trier of fact; while peremptory challenges may have value in this regard, particularly in the criminal context, there is no federal constitutional obligation to allow them; peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

[***HN8]

government action -- equal protection --

Headnote:

In determining whether a particular action or course of action is governmental in character, for purposes of the Federal Constitution's guarantees of individual liberty and equal protection, it is relevant to examine (1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional government function; and (3) whether the injury is aggravated in a unique way by the incidents of governmental authority.

[***HN9]

state action -- equal protection --

Headnote:

Private use of state-sanctioned private remedies or procedures does not, by itself, rise to the level of state action, for purposes of the Federal Constitution's guarantees of individual liberty and equal protection.

[***HN10]

summons --

Headnote:

Potential jurors who are summoned by a clerk of a United States District Court are required to travel to a federal courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers.

[***HN11]

rules -- voir dire -- challenges --

Headnote:

Under Rule 47 of the Federal Rules of Civil Procedure, a trial judge exercises substantial control over voir dire in the federal system; the judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges; the judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes.

[***HN12]

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

peremptory challenges -- race discrimination -- due process -- government function --

Headnote:

Even though private litigants in a civil case which originates in a United States District Court do not act pursuant to any contractual relation with the government--and even though, in most such civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action for purposes of the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment--the same cannot be said of the use of peremptory challenges, for when private litigants participate in the selection of jurors, the private litigants serve an important function within the government and act with its substantial assistance, because (1) peremptory challenges are used in selecting an entity--the jury--that is a quintessential government body, having no attributes of a private actor and exercising the power of the court and of the government that confers the court's jurisdiction; (2) though the motive of a peremptory challenge may be to protect a private interest, the objective of jury-selection proceedings is to determine representation on a governmental body; (3) were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action; (4) the fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised, where (a) an adversarial relationship does not exist between the government and a private litigant in the ordinary context of civil litigation in which the government is not a party, and (b) in the jury-selection process, the government and private litigants work to the same end; and (5) if peremptory challenges based on race were permitted, (a) persons could be required by summons to be put at risk of open and public discrimination as a condition of such persons' participation in the justice system, and (b) the injury to excluded jurors would be the direct result of governmental delegation and participation. (O'Connor, J., Rehnquist, Ch. J., and Scalia, J., dissented from this holding.)

[***HN13]

function of system --

Headnote:

The jury system performs the critical government functions of guarding the rights of litigants and of insuring the continued acceptance of the laws by all the people.

[***HN14]

Seventh Amendment -- findings and verdict --

Headnote:

In the federal system, the United States Constitution, pursuant to the Seventh Amendment, commits the trial of facts in a civil cause to the jury; should either party to such a cause invoke the party's Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict; the jury's factual determinations as a general rule are final.

[***HN15]

conformity to verdict -- enforceability --

Headnote:

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

In all jurisdictions, a true verdict of a civil jury will be incorporated in a judgment enforceable by the court; the verdict of a civil jury, no less than the verdict of a criminal jury, becomes a binding judgment of the court.

[***HN16]

race discrimination -- officials -- employees --

Headnote:

If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the federal constitutional mandate of race neutrality. (O'Connor, J., Rehnquist, Ch. J., and Scalia, J., dissented in part from this holding.)

[***HN17]

race discrimination -- voting -- peremptory challenges --

Headnote:

For purposes of the federal constitutional mandate of race neutrality, the principle that the selection of state officials, other than through election by all qualified voters, may constitute state action applies with even greater force in the context of jury selection through the use of peremptory challenges. (O'Connor, J., Rehnquist, Ch. J., and Scalia, J., dissented from this holding.)

[***HN18]

peremptory challenges -- federal civil case -- race discrimination -- due process -- standing --

Headnote:

For purposes of applying the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment to a claim that a private litigant, in a civil case which originates in a United States District Court, has exercised peremptory challenges to exclude prospective jurors on account of their race, an opposing litigant has third-party standing to raise the excluded jurors' rights in the opposing litigant's own behalf, because the United States Supreme Court's prior conclusion--in the context of a criminal case involving a prosecutor's allegedly race-based exercise of peremptory challenges--that persons excluded from jury service will be unable to protect their own rights applies with equal force in a civil trial, given that (1) there is no reason to suppose that the barriers to suit by an excluded juror would be less daunting in the civil context; (2) the relationship between the excluded venireperson and the litigant opposing the exclusion--which relationship is established by voir dire and is severed by the peremptory challenge--is just as close in the civil as in the criminal context; and (3) a civil litigant can demonstrate a sufficient interest in challenging the exclusion of jurors on account of their race, for (a) the harms recognized in the criminal context--through the doubt cast on the integrity of the judicial process by such racial discrimination--are not limited to the criminal sphere, and (b) a civil proceeding often implicates significant rights and interests.

[***HN19]

interest in controversy --

Headnote:

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.

[***HN20]

juries' functions --

Headnote:

Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders.

[***HN21]

race discrimination -- courtroom --

Headnote:

Racial discrimination has no place in the courtroom, regardless of whether the proceeding is civil or criminal, for (1) Congress has so mandated by prohibiting, in 18 USCS 243 and in 28 USCS 1861 and 1862, various discriminatory acts in the context of both civil and criminal trials; and (2) the United States Constitution demands nothing less.

[***HN22]

sufficiency -- discrimination -- juries --

Headnote:

In both the civil and criminal context with respect to a claim that peremptory challenges have been used, in violation of an equal protection provision of the Federal Constitution, to exclude prospective jurors on account of their race, the determination whether a prima facie case of racial discrimination has been established requires consideration of all the circumstances, including whether there has been a pattern of strikes against members of a particular race.

[***HN23]

what left open on remand --

Headnote:

On certiorari to review a Federal Court of Appeals' decision that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications, the United States Supreme Court--in reversing the Court of Appeals' judgment, in remanding the case, and in holding that, under the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment, a private litigant in a civil case which originates in a United States District Court may not use peremptory challenges to exclude prospective jurors on account of their race--will leave it to the trial courts in the first instance to develop evidentiary rules for implementing the Supreme Court's decision.

SYLLABUS: Petitioner Edmonson sued respondent Leesville Concrete Co. in the District Court, alleging that Leesville's negligence had caused him personal injury. During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, Edmonson, who is black, requested that the court require Leesville to articulate a race-neutral explanation for the peremptory strikes. The court refused on the ground that *Batson* does not apply in civil proceedings, and the empaneled jury, which consisted of 11 white persons and 1 black, rendered a verdict unfavorable to Edmonson. The Court of Appeals affirmed, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications.

Held: A private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race. Pp. 618-631.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

(a) Race-based exclusion of potential jurors in a civil case violates the excluded persons' equal protection rights. Cf., e. g., *Powers v. Ohio*, 499 U.S. 400, 402, 113 L. Ed. 2d 411, 111 S. Ct. 1364. Although the conduct of private parties lies beyond the Constitution's scope in most instances, Leesville's exercise of peremptory challenges was pursuant to a course of state action and is therefore subject to constitutional requirements under the analytical framework set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939-942, 73 L. Ed. 2d 482, 102 S. Ct. 2744. First, the claimed constitutional deprivation results from the exercise of a right or privilege having its source in state authority, since Leesville would not have been able to engage in the alleged discriminatory acts without 28 U. S. C. § 1870, which authorizes the use of peremptory challenges in civil cases. Second, Leesville must in all fairness be deemed a government actor in its use of peremptory challenges. Leesville has made extensive use of government procedures with the overt, significant assistance of the government, see, e. g., *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486, 99 L. Ed. 2d 565, 108 S. Ct. 1340, in that peremptory challenges have no utility outside the jury trial system, which is created and governed by an elaborate set of statutory provisions and administered solely by government officials, including the trial judge, himself a state actor, who exercises substantial control over voir dire and effects the final and practical denial of the excluded individual's opportunity to serve on the petit jury by discharging him or her. Moreover, the action in question involves the performance of a traditional governmental function, see, e. g., *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809, since the peremptory challenge is used in selecting the jury, an entity that is a quintessential governmental body having no attributes of a private actor. Furthermore, the injury allegedly caused by Leesville's use of peremptory challenges is aggravated in a unique way by the incidents of governmental authority, see *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, since the courtroom is a real expression of the government's constitutional authority, and racial exclusion within its confines compounds the racial insult inherent in judging a citizen by the color of his or her skin. Pp. 618-628.

(b) A private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. Just as in the criminal context, see *Powers*, *supra*, all three of the requirements for third-party standing are satisfied in the civil context. First, there is no reason to believe that the daunting barriers to suit by an excluded criminal juror, see *id.*, at 414, would be any less imposing simply because the person was excluded from civil jury service. Second, the relation between the excluded venireperson and the litigant challenging the exclusion is just as close in the civil as it is in the criminal context. See *id.*, at 413. Third, a civil litigant can demonstrate that he or she has suffered a concrete, redressable injury from the exclusion of jurors on account of race, in that racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the proceeding in doubt. See *id.*, at 411. Pp. 628-631.

(c) The case is remanded for a determination whether Edmonson has established a *prima facie* case of racial discrimination under the approach set forth in *Batson*, *supra*, at 96-97, such that Leesville would be required to offer race-neutral explanations for its peremptory challenges. P. 631.

COUNSEL: James B. Doyle argued the cause and filed a brief for petitioner.

John S. Baker, Jr., argued the cause for respondent. With him on the brief was John B. Honeycutt, Jr. *

* Briefs of amici curiae urging reversal were filed for the American Civil Liberties Union by Steven R. Shapiro and John A. Powell; for the NAACP Legal Defense and Educational Fund, Inc., et al. by Julius LeVonne Chambers, Eric Schnapper, Samuel Rabinove, Deval L. Patrick, Marc Goodheart, Robert F. Mullen, David S. Tatel, Norman Redlich, Thomas J. Henderson, and Richard T. Seymour.

Briefs of amici curiae urging affirmance were filed for Defense Research Institute by Jeanmarie LoCoco and John J. Weigel; for Dixie Insurance Co. by Suzanne N. Saunders; and for Louisiana Association of Defense Counsel by Joseph R. Ward, Jr., and Wood Brown III.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, post, p. 631. SCALIA, J., filed a dissenting opinion, post, p. 644.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

OPINIONBY: KENNEDY

OPINION: [*616] [***670] [**2080] JUSTICE KENNEDY delivered the opinion of the Court.

[**HR1A] We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors. This civil case originated in a United States District Court, and we apply the equal protection component of the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

I

Thaddeus Donald Edmonson, a construction worker, was injured in a jobsite accident at Fort Polk, Louisiana, a federal enclave. Edmonson sued Leesville Concrete Company for negligence in the United States District Court for the Western District of Louisiana, claiming that a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment. [**2081] Edmonson invoked his Seventh Amendment right to a trial by jury.

During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove [***671] black persons from the prospective jury. Citing our decision in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), Edmonson, who is [*617] himself black, requested that the District Court require Leesville to articulate a race-neutral explanation for striking the two jurors. The District Court denied the request on the ground that *Batson* does not apply in civil proceedings. As empaneled, the jury included 11 white persons and 1 black person. The jury rendered a verdict for Edmonson, assessing his total damages at \$90,000. It also attributed 80% of the fault to Edmonson's contributory negligence, however, and awarded him the sum of \$18,000.

Edmonson appealed, and a divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that our opinion in *Batson* applies to a private attorney representing a private litigant and that peremptory challenges may not be used in a civil trial for the purpose of excluding jurors on the basis of race. 860 F.2d 1308 (1989). The Court of Appeals panel held that private parties become state actors when they exercise peremptory challenges and that to limit *Batson* to criminal cases "would betray *Batson's* fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause." *Id.*, at 1314. The panel remanded to the trial court to consider whether Edmonson had established a *prima facie* case of racial discrimination under *Batson*.

The full court then ordered rehearing en banc. A divided en banc panel affirmed the judgment of the District Court, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications. 895 F.2d 218 (1990). The court concluded that the use of peremptories by private litigants does not constitute state action and, as a result, does not implicate constitutional guarantees. The dissent reiterated the arguments of the vacated panel opinion. The Courts of Appeals have divided on the issue. See *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281 (CA7 1990) (private litigant may not use peremptory challenges to exclude venirepersons on account of race); *Fludd v. Dykes*, 863 F.2d 822 [*618](CA11 1989) (same). Cf. *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (CA9 1990) (corporation may not raise a *Batson*-type objection in a civil trial); *United States v. De Gross*, 913 F.2d 1417 (CA9 1990) (government may raise a *Batson*-type objection in a criminal case), rehearing en banc granted, 930 F.2d 695 (1991); *Reynolds v. Little Rock*, 893 F.2d 1004 (CA8 1990) (when government is involved in civil litigation, it may not use its peremptory challenges in a racially discriminatory manner). We granted certiorari, 498 U.S. 809 (1990), and now reverse the Court of Appeals.

II

A

[**HR1B] In [HN1] *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991), we held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury. Our conclusion rested on a two-part analysis. First, following our opinions in *Batson* and in [***672] *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 24 L. Ed. 2d 549, 90 S. Ct. 518 (1970), we made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

499 U.S. at 407-409. Second, we relied on well-established rules of third-party standing to hold that a defendant may raise the excluded jurors' equal protection rights. *Id.*, at 410-415.

Powers relied upon over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process. [*2082] See, e. g., *Batson*, supra, at 84; *Swain v. Alabama*, 380 U.S. 202, 203-204, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965); *Carter*, supra, at 329-330; *Neal v. Delaware*, 103 U.S. 370, 386, 26 L. Ed. 567 (1881); *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880). While these decisions were for the most part directed at discrimination by a prosecutor or other government officials in the context of criminal proceedings, we have not intimated that race discrimination is permissible in civil proceedings. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220-221, 90 L. Ed. 1181, 66 S. Ct. 984 (1946). Indeed, [*619] discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. See *id.*, at 220. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.

***HR1C] ***HR2A] ***HR3] That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. [HN2] The Constitution's protections of individual liberty and equal protection apply in general only to action by the government. *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988). Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 172, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972). Thus, the legality of the exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.

***HR2B] ***HR4] The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. *Tarkanian*, supra, at 191; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). This fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). One great object of the Constitution is to permit citizens to structure [*673] their private relations as they choose subject only to the constraints of statutory or decisional law.

[*620]

***HR2C] To implement these principles, courts must consider from time to time where the governmental sphere ends and the private sphere begins. [HN3] Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action, which explores the "essential dichotomy" between the private sphere and the public sphere, with all its attendant constitutional obligations. *Moose Lodge*, supra, at 172.

***HR1D] ***HR5A] ***HR6A] We begin our discussion within the framework for state-action analysis set forth in [HN4] *Lugar*, supra, at 937. There we considered the state-action question in the context of a due process challenge to a State's procedure allowing private parties to obtain prejudgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, 457 U.S. at 939-941; [*2083] and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, *id.*, at 941-942.

***HR1E] ***HR5B] ***HR7] There can be no question that the first part of the *Lugar* inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact. While we have recognized the value of peremptory challenges in this regard, particularly in the criminal context, see *Batson*, 476 U.S. at 98-99, there is no constitutional obligation to allow them. [HN5] *Ross v. Oklahoma*, 487 U.S. 81, 88, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988); *Stilson v. United States*, 250 U.S. 583, 586, 63 L. Ed. 1154, 40 S. Ct. 28 (1919). Peremptory challenges are

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

[*621]

***HR5C] Legislative authorizations, as well as limitations, for the use of peremptory challenges date as far back as the founding of the Republic; and the common-law origins of peremptories predate that. See *Holland v. Illinois*, 493 U.S. 474, 481, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990); *Swain*, 380 U.S. at 212-217. Today in most jurisdictions, statutes or rules make a limited number of peremptory challenges available to parties in both civil and criminal proceedings. In the case before us, the challenges were exercised under a federal statute that provides, *inter alia*:

"In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit ***674] them to be exercised separately or jointly." 28 U. S. C. § 1870.

Without this authorization, granted by an Act of Congress itself, *Leesville* would not have been able to engage in the alleged discriminatory acts.

***HR1F] ***HR6B] ***HR8] Given that the statutory authorization for the challenges exercised in this case is clear, the remainder of our state-action analysis centers around the second part of the *Lugar* test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. Although we have recognized that this aspect of the analysis is often a factbound inquiry, see *Lugar*, *supra*, at 939, our cases disclose certain principles of general application. Our precedents establish that, [HN6] in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961); whether the actor is performing a traditional governmental function, see *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953); *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic [**622] Comm.*, 483 U.S. 522, 544-545, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948). Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

***HR6C] ***HR9] Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, [*2084] [HN7] *Tulsa Professional*, 485 U.S. at 485, our cases have found state action when private parties make extensive use of state procedures with "the overt, significant assistance of state officials." *Id.*, at 486; see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969). It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers. In the federal system, Congress has established the qualifications for jury service, see 28 U. S. C. § 1865, and has outlined the procedures by which jurors are selected. To this end, each district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. 28 U. S. C. § 1863; see, e. g., *Jury Plan for the United States District Court for the Western District of Louisiana* (on file with Administrative Office of United States Courts). This plan, as [*675] with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, 28 U. S. C. § 1861, and nonexclusion on account of race, color, religion, sex, national origin, or economic status, 18 U. S. C. § 243; 28 U. S. C. § 1862. Statutes prescribe many of the details of the jury plan, 28 U. S. C. § 1863, defining the jury wheel, § 1863(b)(4), voter lists, §§ 1863(b)(2), [*623] 1869(c), and jury commissions, § 1863(b)(1). A statute also authorizes the establishment of procedures for assignment to grand and petit juries, § 1863(b)(8), and for lawful excuse from jury service, §§ 1863(b)(5), (6).

***HR6D] ***HR10] At the outset of the selection process, prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. See 28 U. S. C. § 1864. Failure to do so may

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. *Ibid.* In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. See G. Bermant, *Jury Selection Procedures in United States District Courts 7-8* (Federal Judicial Center 1982). The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service. 28 U. S. C. § 1871.

[***HR6E] [***HR11] The trial judge exercises substantial control over voir dire in the federal system. See Fed. Rule Civ. Proc. 47. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire voir dire by themselves, a common practice in the District Court where the instant case was tried. See Louisiana Rules of Court, Local Rule 13.02 (WD La. 1990). The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. 28 U. S. C. § 1870. When a lawyer exercises a peremptory [*624] challenge, the judge advises the juror he or she has been excused.

[***HR6F] As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. [**2085] The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the "final and practical denial" of the excluded individual's opportunity to serve on the petit jury. *Virginia v. Rives*, 100 U.S. 313, 322, 25 L. Ed. 667 (1880). Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system [***676] would serve no purpose. By enforcing a discriminatory peremptory challenge, the court "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." *Burton v. Wilmington Parking Authority*, 365 U.S. at 725. In so doing, the government has "created the legal framework governing the [challenged] conduct," *National Collegiate Athletic Assn.*, 488 U.S. at 192, and in a significant way has involved itself with invidious discrimination.

[***HR6G] [***HR12A] [***HR13] [***HR14] [***HR15A] In determining Leesville's state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. As we noted in *Powers*, the jury system performs the critical governmental functions of guarding the rights of litigants and "ensuring continued acceptance of the laws by all of the people." 499 U.S. at 407. In the federal system, the Constitution itself commits the trial of facts in a civil cause to the [*625] jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final. *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 10 L. Ed. 2d 80, 83 S. Ct. 965 (1963). In some civil cases, as we noted earlier this Term, the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991). A judgment based upon a civil verdict may be preclusive of issues in a later case, even where some of the parties differ. See *Allen v. McCurry*, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). And in all jurisdictions a true verdict will be incorporated in a judgment enforceable by the court. These are traditional functions of government, not of a select, private group beyond the reach of the Constitution.

[***HR16] [HN8] If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality. Cf. *Tarkanian*, 488 U.S. at 192-193; *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982). At least a plurality of the Court recognized this principle in *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953). There we found state action in a scheme in which a private organization known as the Jaybird Democratic Association conducted whites-only elections to select candidates to run in the Democratic primary elections in Ford Bend County, Texas. The Jaybird candidate was certain to win the Democratic primary and the Democratic candidate was certain to win the general election. Justice Clark's concurring opinion drew from *Smith v. Allwright*, 321 U.S. 649, 664, 88 L. Ed. 987, 64 S. Ct.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

757 [***677] (1944), the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints." Terry, *supra*, at 481. The concurring opinion concluded:

[*626] [**2086] "When a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." 345 U.S. at 484.

[***HR12B] [***HR17] The principle that the selection of state officials, other than through election by all qualified voters, may constitute state action applies with even greater force in the context of jury selection through the use of peremptory challenges. Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. The delegation of authority that in Terry occurred without the aid of legislation occurs here through explicit statutory authorization.

We find respondent's reliance on *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. See *id.*, at 325; *Branti v. Finkel*, 445 U.S. 507, 519, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. 454 U.S. at 323, n.13. "[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.*, at 321.

[*627]

[***HR1G] [***HR6H] [***HR12C] In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson*, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.

[***678] Our decision in *West v. Atkins*, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988), provides a further illustration. We held there that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but we held his "function[s] within the state system, not the precise terms of his employment, [determined] whether his actions can fairly be attributed to the State." *Id.*, at 55-56. We noted:

"Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.*, at 55.

[***HR12D] In the case before us, the parties do not act pursuant to any contractual relation with the government. Here, as in most civil [**2087] cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state [*628] action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

[***HR6I] Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. *Rose v. Mitchell*, 443 U.S. 545, 556, 61 L. Ed. 2d 739, 99 S. Ct. 2993 (1979); *Smith v. Texas*, 311 U.S. 128, 130, 85 L. Ed. 84, 61 S. Ct. 164 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers*, 499 U.S. at 402. To permit racial exclusion in this official forum compounds the racial insult inherent [***679] in judging a citizen by the color of his or her skin.

B

[***HR1H] [***HR18A] [***HR19] Having held that in a civil trial exclusion on account of race violates a prospective juror's equal protection rights, we consider [*629] whether an opposing litigant may raise the excluded person's rights on his or her behalf. As we noted in *Powers*: [HN9] "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Id.*, at 410. We also noted, however, that this fundamental restriction on judicial authority admits of "certain, limited exceptions," *ibid.*, and that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. All three of these requirements for third-party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well.

[***HR18B] Our conclusion in *Powers* that persons excluded from jury service will be unable to protect their own rights applies with equal force in a civil trial. While individual jurors subjected to peremptory racial exclusion have the right to bring suit on their own behalf, "the barriers to a suit by an excluded juror are daunting." *Id.*, at 414. We have no reason to believe these barriers would be any less imposing simply because a person was excluded from jury service in a civil proceeding. Likewise, we find the relation between the excluded venireperson and the litigant challenging the exclusion to be just as close in the civil context as in a criminal trial. Whether in a civil or criminal proceeding, "voir dire permits a party to establish a relation, if not a bond of trust, with the jurors," a relation that "continues throughout the entire trial." *Id.*, [*2088] at 413. Exclusion of a juror on the basis of race severs that relation in an invidious way.

We believe the only issue that warrants further consideration in this case is whether a civil litigant can demonstrate a sufficient interest in challenging the exclusion of jurors on account of race. In *Powers*, we held:

[HN10] "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable [*630] injury, and the defendant has a concrete interest in challenging the practice. See *Allen v. Hardy*, 478 U.S. [255,] 259 [(1986)] (recognizing a defendant's interest in 'neutral jury selection procedures'). This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose v. Mitchell*, [supra, at 556], and places the fairness of a criminal proceeding in doubt." *Id.*, at 411.

[***680]

[***HR15B] [***HR18C] [***HR20] [***HR21] The harms we recognized in *Powers* are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

courtroom, whether the proceeding is civil or criminal. See *Thiel v. Southern Pacific Co.*, 328 U.S. at 220. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U. S. C. § 243; 28 U. S. C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial.

[***HR11] It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes [*631] retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.

III

[***HR22] [***HR23] It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In *Batson*, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. 476 U.S. at 96-97. [**2089] The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.

The judgment is reversed, and the case is remanded for further proceedings consistent with our opinion.

It is so ordered.

DISSENTBY: O'CONNOR; SCALIA

DISSENT: [***681] JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court concludes that the action of a private attorney exercising a peremptory challenge is attributable to the government and therefore may compose a constitutional violation. [*632] This conclusion is based on little more than that the challenge occurs in the course of a trial. Not everything that happens in a courtroom is state action. A trial, particularly a civil trial is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.

I

In order to establish a constitutional violation, Edmonson must first demonstrate that Leesville's use of a peremptory challenge can fairly be attributed to the government. Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency. Perhaps this is because the state action determination is so closely tied to the "framework of the peculiar facts or circumstances present." See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961). Whatever the reason, and despite the confusion, a coherent principle has emerged. We have stated the rule in various ways, but at base, "constitutional standards are invoked only when it can be said that the [government] is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982). Constitutional "liability attaches only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

capacity." *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988), quoting *Monroe v. Pape*, 365 U.S. 167, 172, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961).

[*633] The Court concludes that this standard is met in the present case. It rests this conclusion primarily on two empirical assertions. First, that private parties use peremptory challenges with the "overt, significant participation of the government." Ante, at 622. Second, that the use of a peremptory challenge by a private party "involves the performance of a traditional function of the government." Ante, at 624. Neither of these assertions is correct.

A

The Court begins with a perfectly accurate definition of the peremptory challenge. Peremptory challenges "allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." Ante, at 620. This [***682] description is worth more careful analysis, for it belies the Court's later conclusions about the peremptory.

The peremptory challenge "allow[s] parties," in this case private parties, to exclude potential jurors. It is the nature of a peremptory that its exercise is left wholly within the discretion of the litigant. The purpose of this longstanding practice is to establish for each party an "arbitrary and capricious species [**2090] of challenge" whereby the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" may be acted upon. *Lewis v. United States*, 146 U.S. 370, 376, 36 L. Ed. 1011, 13 S. Ct. 136 (1892), quoting 4 W. Blackstone, Commentaries *353. By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury. *Ibid.*; *Hayes v. Missouri*, 120 U.S. 68, 70, 30 L. Ed. 578, 7 S. Ct. 350 (1887); *Swain v. Alabama*, 380 U.S. 202, 219, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965); *Holland v. Illinois*, 493 U.S. 474, 481-482, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990). In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of private choice in the pursuit of fairness. The peremptory is, by design, [*634] an enclave of private action in a government-managed proceeding.

The Court amasses much ostensible evidence of the Federal Government's "overt, significant assistance" in the peremptory process. See ante, at 624. Most of this evidence is irrelevant to the issue at hand. The bulk of the practices the Court describes -- the establishment of qualifications for jury service, the location and summoning of prospective jurors, the jury wheel, the voter lists, the jury qualification forms, the per diem for jury service -- are independent of the statutory entitlement to peremptory strikes, or of their use. All of this government action is in furtherance of the Government's distinct obligation to provide a qualified jury; the Government would do these things even if there were no peremptory challenges. All of this activity, as well as the trial judge's control over voir dire, see ante, at 623-624, is merely a prerequisite to the use of a peremptory challenge; it does not constitute participation in the challenge. That these actions may be necessary to a peremptory challenge -- in the sense that there could be no such challenge without a venire from which to select -- no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

The entirety of the government's actual participation in the peremptory process boils down to a single fact: "When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused." *Ibid.* This is not significant participation. The judge's action in "advising" a juror that he or she has been excused is state action to be sure. It is, however, if not de minimis, far from what our cases have required in order to hold the government "responsible" for private action or to find that private actors "represent" the government. See *Blum*, supra, at 1004; *Tarkanian*, supra, [***683] at 191. The government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, [*635] either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, supra, at 1004.

As an initial matter, the judge does not "encourage" the use of a peremptory challenge at all. The decision to strike a juror is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge. It is the attorney who strikes. The judge does little more than acquiesce in this decision by excusing the juror. In point of fact, the government has virtually no role in the use of peremptory challenges. Indeed, there are jurisdictions in which, with the consent of the parties, voir dire and jury selection may take place in the absence of any court personnel. See *Haith v. United States*, 231 F. Supp. 495 (ED Pa. 1964), *aff'd*, 342 F.2d 158 (CA3 1965) (*per curiam*); *State v. Eberhardt*, 32 Ohio Misc. 39, 282 N.E.2d 62 (1972).

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

The alleged state action here is a far cry from that which the Court found, for example, in *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948). In that case, state courts were called upon to enforce racially [**2091]restrictive covenants against sellers of real property who did not wish to discriminate. The coercive power of the State was necessary in order to enforce the private choice of those who had created the covenants: "But for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.*, at 19. Moreover, the courts in *Shelley* were asked to enforce a facially discriminatory contract. In contrast, peremptory challenges are "exercised without a reason stated [and] without inquiry." *Swain*, *supra*, at 220. A judge does not "significantly encourage" discrimination by the mere act of excusing a juror in response to an unexplained request.

There is another important distinction between *Shelley* and this case. The state courts in *Shelley* used coercive force to impose conformance on parties who did not wish to discriminate. "Enforcement" of peremptory challenges, on [*636]the other hand, does not compel anyone to discriminate; the discrimination is wholly a matter of private choice. See Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 819 (1989). Judicial acquiescence does not convert private choice into that of the State. See *Blum*, 457 U.S. at 1004-1005.

Nor is this the kind of significant involvement found in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). There, we concluded that the actions of the executrix of an estate in providing notice to creditors that they might file claims could fairly be attributed to the State. The State's involvement in the notice process, we said, was "pervasive and substantial." *Id.*, at 487. In particular, a state statute directed the executrix to publish notice. [***684] In addition, the District Court in that case had "reinforced the statutory command with an order expressly requiring [the executrix] to 'immediately give notice to creditors.'" *Ibid.* Notice was not only encouraged by the State, but positively required. There is no comparable state involvement here. No one is compelled by government action to use a peremptory challenge, let alone to use it in a racially discriminatory way.

The Court relies also on *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961). See *ante*, at 621, 624. But the decision in that case depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building. The State had "so far insinuated itself into a position of interdependence with" the restaurant that it had to be "recognized as a joint participant in the challenged activity." *Burton*, *supra*, at 725. Among the "peculiar facts [and] circumstances" leading to that conclusion was that the State stood to profit from the restaurant's discrimination. 365 U.S. at 726, 724. As I have shown, the government's involvement in the use of peremptory challenges falls far short of "interdependence" [*637] or "joint participation." Whatever the continuing vitality of *Burton* beyond its facts, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974), it does not support the Court's conclusion here.

Jackson is a more appropriate analogy to this case. *Metropolitan Edison* terminated *Jackson's* electrical service under authority granted it by the State, pursuant to a procedure approved by the state utility commission. Nonetheless, we held that *Jackson* could not challenge the termination procedure on due process grounds. The termination was not state action because the State had done nothing to encourage the particular termination practice:

"Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice [**2092] by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.*, at 357 (emphasis added; footnote omitted).

The similarity to this case is obvious. The Court's "overt, significant" government participation amounts to the fact that the government provides the mechanism whereby a litigant can choose to exercise a peremptory challenge. That the government allows this choice and that the judge approves it, does not turn this private decision into state action.

To the same effect is *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). In that case, a warehouse company's proposed sale of goods entrusted to it for storage pursuant to the New York Uniform Commercial Code was not fairly attributable to the State. We [***685] held that "the State of New York is in no way

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings." *Id.*, at 165. [*638] Similarly, in the absence of compulsion, or at least encouragement, from the government in the use of peremptory challenges, the government is not responsible.

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain, 380 U.S. at 220. The government neither encourages nor approves such challenges. Accordingly, there is no "overt, significant participation" by the government.

B

The Court errs also when it concludes that the exercise of a peremptory challenge is a traditional government function. In its definition of the peremptory challenge, the Court asserts, correctly, that jurors struck via peremptories "otherwise . . . satisfy the requirements for service on the petit jury." Ante, at 620. Whatever reason a private litigant may have for using a peremptory challenge, it is not the government's reason. The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service. "Peremptory challenges are exercised by a party, not in selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger." C. Lincoln, *Abbott's Civil Jury Trials* 92 (3d ed. 1912), quoting *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560, 561, 35 N.W. 162, 163 (1887). For this reason, the Court is incorrect, and inconsistent with its own definition of the peremptory challenge, when it says that "in the jury selection process [in a civil trial], the government and private litigants work for the same end." See ante, at 627. The Court is also incorrect when it says that a litigant exercising a peremptory challenge is performing "a traditional function of the government." See ante, at 624.

[*639] The peremptory challenge is a practice of ancient origin, part of our common law heritage in criminal trials. See Swain, *supra*, at 212-218 (tracing history); Holland, 493 U.S. at 481 (same). Congress imported this tradition into federal civil trials in 1872. See ch. 333, 17 Stat. 282; Swain, 380 U.S. at 215, n.14. The practice of unrestrained private choice in the selection of civil juries is even older than that, however. While there were no peremptory challenges in civil trials at common law, the struck jury system allowed each side in both criminal and civil trials to strike alternately, and without explanation, a fixed number of jurors. See *id.*, at 217-218, [**2093] and n.21, citing J. Proffatt, *Trial by Jury* § 72 (1877), and F. Busch, *Law and Tactics in Jury Trials* § 62 (1949). Peremptory challenges are not a traditional government function; the "tradition" is one of unguided [***686] private choice. The Court may be correct that "were it not for peremptory challenges, . . . the entire process of determining who will serve on the jury [would] constitute state action." Ante, at 626. But there are peremptory challenges, and always have been. The peremptory challenge forms no part of the government's responsibility in selecting a jury.

A peremptory challenge by a private litigant does not meet the Court's standard; it is not a traditional government function. Beyond this, the Court has misstated the law. The Court cites *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953), and *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946), for the proposition that state action may be imputed to one who carries out a "traditional governmental function." Ante, at 621. In those cases, the Court held that private control over certain core government activities rendered the private action attributable to the State. In *Terry*, the activity was a private primary election that effectively determined the outcome of county general elections. In *Marsh*, a company that owned a town had attempted to prohibit on its sidewalks certain protected speech.

[*640] In *Flagg Bros.*, *supra*, the Court reviewed these and other cases that found state action in the exercise of certain public functions by private parties. See 436 U.S. at 157-160, reviewing *Terry*, *Marsh*, *Smith v. Allwright*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944), and *Nixon v. Condon*, 286 U.S. 73, 76 L. Ed. 984, 52 S. Ct. 484 (1932). We explained that the government functions in these cases had one thing in common: exclusivity. The public-function doctrine requires that the private actor exercise "a power 'traditionally exclusively reserved to the State.'" 436 U.S. at 157, quoting *Jackson*, 419 U.S. at 352. In order to constitute state action under this doctrine, private conduct must not only comprise something that the government traditionally does, but something that only the government traditionally does. Even if one could fairly characterize the use of a peremptory strike as the performance of the traditional government function of jury selection, it has never been exclusively the function of the government to select juries; peremptory strikes are older than the Republic.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988), is not to the contrary. The Court seeks to derive from that case a rule that one who "serve[s] an important function within the government," even if not a government employee, is thereby a state actor. See ante, at 628. Even if this were the law, it would not help the Court's position. The exercise of a peremptory challenge is not an important government function; it is not a government function at all. In any event, *West* does not stand for such a broad proposition. The doctor in that case was under contract with the State to provide services for the State. More important, the State hired the doctor in order to fulfill the State's constitutional obligation to attend to the necessary medical care of prison inmates. 487 U.S. at 53, n.10, 57. The doctor's relation to the [***687] State, and the State's responsibility, went beyond mere performance of an important job.

The present case is closer to *Jackson*, supra, and *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982), than to *Terry*, *Marsh*, [*641] or *West*. In the former cases, the alleged state activities were those of state-regulated private actors performing what might be considered traditional public functions. See *Jackson* (electrical utility); *Rendell-Baker* (school). In each case, the Court held that the performance of such a function, even if state regulated or state funded, was not state action unless the function [**2094] had been one exclusively the prerogative of the State, or the State had provided such significant encouragement to the challenged action that the State could be held responsible for it. See *Jackson*, 419 U.S. at 352-353, 357; *Rendell-Baker*, supra, at 842, 840. The use of a peremptory challenge by a private litigant meets neither criterion.

C

None of this should be news, as this case is fairly well controlled by *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981). We there held that a public defender, employed by the State, does not act under color of state law when representing a defendant in a criminal trial. * In such a circumstance, government employment is not sufficient to create state action. More important for present purposes, neither is the performance of a lawyer's duties in a courtroom. This is because a lawyer, when representing a private client, cannot at the same time represent the government.

* *Dodson* was a case brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, the statutory mechanism for many constitutional claims. The issue in that case, therefore, was whether the public defender had acted "under color of state law." 454 U.S. at 314. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982), the Court held that the statutory requirement of action "under color of state law" is identical to the "state action" requirement for other constitutional claims.

Trials in this country are adversarial proceedings. Attorneys for private litigants do not act on behalf of the government, or even the public as a whole; attorneys represent their clients. An attorney's job is to "advance the 'undivided interests of his client.' This is essentially a private function . . . for which state office and authority are not [*642] needed." *Id.*, at 318-319 (footnotes omitted). When performing adversarial functions during trial, an attorney for a private litigant acts independently of the government:

"It is the function of the public defender to enter not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities." *Id.*, at 320 (footnote omitted).

Our conclusion in *Dodson* was that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.*, at 325. [***688] It cannot be gainsaid that a peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection. The Court does not challenge the rule of *Dodson*, yet concludes that private attorneys performing this adversarial function are state actors. Where is the distinction?

The Court wishes to limit the scope of *Dodson* to the actions of public defenders in an adversarial relationship with the government. Ante, at 626-627. At a minimum then, the Court must concede that *Dodson* stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client, nor is an attorney representing a private litigant in a civil suit against the government. Both of these propositions are true, but the Court's

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

distinction between this case and *Dodson* turns state action doctrine on its head. Attorneys in an adversarial relation to the state are not state actors, but that does not mean that attorneys who are not in such a relation are state actors.

The Court is plainly wrong when it asserts that "in the jury selection process, the government and private litigants work for the same end." See ante, at 627. In a civil trial, [*643] the attorneys for each side are in "an [**2095]adversarial relation," *ibid.*; they use their peremptory strikes in direct opposition to one another, and for precisely contrary ends. The government cannot "work for the same end" as both parties. In fact, the government is neutral as to private litigants' use of peremptory strikes. That's the point. The government does not encourage or approve these strikes, or direct that they be used in any particular way, or even that they be used at all. The government is simply not "responsible" for the use of peremptory strikes by private litigants.

Constitutional "liability attaches only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.'" *Tarkanian*, 488 U.S. at 191. A government attorney who uses a peremptory challenge on behalf of the client is, by definition, representing the government. The challenge thereby becomes state action. It is antithetical to the nature of our adversarial process, however, to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.

II

Beyond "significant participation" and "traditional function," the Court's final argument is that the exercise of a peremptory challenge by a private litigant is state action because it takes place in a courtroom. Ante, at 628. In the end, this is all the Court is left with; peremptories do not involve the "overt, significant participation of the government," nor do they constitute a "traditional function of the government." The Court is also wrong in its ultimate claim. If *Dodson* stands for anything, it is that the actions of a lawyer in a courtroom do not become those of the government by virtue of their location. This is true even if those actions are based on race.

[**689] Racism is a terrible thing. It is irrational, destructive, and mean. Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum [*644] established by the government for the resolution of disputes through "quiet rationality." See ante, at 631. But not every opprobrious and inequitable act is a constitutional violation. The Fifth Amendment's Due Process Clause prohibits only actions for which the Government can be held responsible. The Government is not responsible for everything that occurs in a courtroom. The Government is not responsible for a peremptory challenge by a private litigant. I respectfully dissent.

JUSTICE SCALIA, dissenting.

I join JUSTICE O'CONNOR'S dissent, which demonstrates that today's opinion is wrong in principle. I write to observe that it is also unfortunate in its consequences.

The concrete benefits of the Court's newly discovered constitutional rule are problematic. It will not necessarily be a net help rather than hindrance to minority litigants in obtaining racially diverse juries. In criminal cases, *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), already prevents the prosecution from using race-based strikes. The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so -- so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to prove race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. In civil cases that is probably not true -- but it does not represent an unqualified gain either. Both sides have peremptory challenges, and they are sometimes used to assure rather than to prevent a racially diverse jury.

The concrete costs of today's decision, on the other hand, are not at all doubtful; and they are enormous. We have now added to the duties of already-submerged state and [**2096] federal trial courts the obligation to assure that race is not included among the other factors (sex, age, religion, political [*645] views, economic status) used by private parties in exercising their peremptory challenges. That responsibility would be burden enough if it were not to be discharged through the adversary process; but of course it is. When combined with our decision this Term in *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991), which held that the party objecting to an allegedly race-based

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

peremptory challenge need not be of the same race as the challenged juror, today's decision means that both sides, in all civil jury cases, no matter what their race (and indeed, even if they are artificial entities such as corporations), may lodge racial-challenge objections and, after those objections have been considered and denied, appeal the denials -- with the consequence, if they are successful, of having the judgments against them overturned. Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more [***690] and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of Batson claims that have made their way even as far as this Court under the pre-Powers regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion. See *Holland v. Illinois*, 493 U.S. 474, 484, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990).

Although today's decision neither follows the law nor produces desirable concrete results, it certainly has great symbolic value. To overhaul the doctrine of state action in this fashion -- what a magnificent demonstration of this institution's uncompromising hostility to race-based judgments, even by private actors! The price of the demonstration is, alas, high, and much of it will be paid by the minority litigants who use our courts. I dissent.

REFERENCES:

47 Am Jur 2d, Jury 173-176, 180, 235

33 Federal Procedure, L Ed, Trial 77:127, 77:136, 77:178

9 Am Jur Proof of Facts 2d 407, Discrimination in Jury Selection--Systematic Exclusion or Underrepresentation of Identifiable Group

5 Am Jur Trials 143, Selecting the Jury--Plaintiff's View; 5 Am Jur Trials 247, Selecting the Jury--Defense View

USCS, Constitution, Amendment 5

L Ed Digest, Civil Rights 8; Constitutional Law 778.5; Jury 44

L Ed Index, Jury and Jury Trial; State Action

Index to Annotations, Equal Protection of Law; Jury and Jury Trial; Peremptory Challenges; State Action

Annotation References:

Racial discrimination in voting, and validity and construction of remedial legislation-- Supreme Court cases. 92 L Ed 2d 809.

Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L Ed 2d 1078.

Supreme Court's views as to application, to conduct of private person or entity, of equal protection and due process clauses of the Fourteenth Amendment. 42 L Ed 2d 922.

Supreme Court's construction of Seventh Amendment's guaranty of right to trial by jury. 40 L Ed 2d 846.

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution--Supreme Court cases. 33 L Ed 2d 783.

500 U.S. 614, *; 111 S. Ct. 2077, **;
114 L. Ed. 2d 660, ***; 1991 U.S. LEXIS 3023

Racial discrimination in labor and employment-- Supreme Court cases. 28 L Ed 2d 928.

Race discrimination-- Supreme Court cases. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.

Use of peremptory challenges to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

KENNETH R. EDWARDS, Plaintiff-Appellant, v. CITY OF GOLDSBORO; CHESTER HILL, individually and in his official capacity; RICHARDSLOZAK, individually and in his official capacity, Defendants-Appellees. PROFESSIONAL FIREFIGHTERS & PARAMEDICS OF NORTH CAROLINA; NORTH CAROLINA STATE LODGE OF THE FRATERNAL ORDER OF POLICE; NORTH CAROLINA TROOPERS' ASSOCIATION; NATIONAL RIFLE ASSOCIATION, Amici Curiae.
No. 97-2609

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

178 F.3d 231; 1999 U.S. App. LEXIS 9088; 43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

December 3, 1998, Argued
May 14, 1999, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-96-448-5-BO-2).

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from a decision of the United States District Court for the Eastern District of North Carolina, at Raleigh, which dismissed plaintiff's claims against defendants, a city, the chief of police, and the city manager, under 42 U.S.C.S. § 1983, the state Constitution, and state common law. Plaintiff challenged defendants' decision to suspend him from the police force for two weeks for teaching a concealed handgun safety course.

OVERVIEW: Plaintiff was placed on probation and suspended from employment without pay for two weeks for teaching a concealed handgun safety course. Defendants, city, chief of police and city manager, previously denied plaintiff permission to teach the course. Defendants conditioned plaintiff's continued employment with the police department upon his not teaching the course. Plaintiff brought claims against defendants under 42 U.S.C.S. § 1983, the state constitution, and state common law. The lower court dismissed plaintiff's claims. The appellate court affirmed in part and reversed in part. The court found that the lower court correctly dismissed all of plaintiff's § 1983 claims, except his § 1983 claims alleging a violation of the right to free speech and freedom of association. The court held that defendant police chief's personal distaste of the content of plaintiff's off-duty instruction regarding concealed handgun safety was insufficient to justify conditioning his continued employment upon the cessation of this protected off-duty expression. The court also found that, at this early pleading stage, defendants chief of police and city manager were not entitled to qualified immunity.

OUTCOME: The appellate court affirmed in part and reversed in part a lower court decision to dismiss plaintiff's claims against defendants, city, chief of police and city manager. The court held that the lower court correctly dismissed all of plaintiff's § 1983 claims against defendants, except his § 1983 claims alleging a violation of his First Amendment rights to free speech and freedom of association.

CORE TERMS: sergeant, handgun, off-duty, concealed, First Amendment, permission, free speech, amend, firearms, matter of public concern, qualified immunity, city manager, discipline, grievance, teaching, continued employment, municipal, teach, carrying, pleading stage, well-pleaded, discovery, accepting, drawing, Second Amendment, lawful possession, academic freedom, agenda, oppose, zeal

LexisNexis (TM) HEADNOTES - Core Concepts:

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Civil Procedure: Appeals: Reviewability: Notice of Appeal

[HN1] Fed. R. App. P. 28(a)(9)(A) requires that the argument section of an appellant's opening brief must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies. Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal.

Civil Procedure: Pleading & Practice: Pleadings: Amended Pleadings

[HN2] Under Fed. R. Civ. P. 15(a), leave to amend a pleading shall be freely given when justice so requires. The U.S. Supreme Court has declared that this mandate is to be heeded.

Civil Procedure: Pleading & Practice: Pleadings: Amended Pleadings

[HN3] The law is well settled that leave to amend a pleading should be denied only when the amendment is prejudicial to the opposing party, there is been bad faith on the part of the moving party, or the amendment is futile.

Civil Procedure: Pleading & Practice: Pleadings: Amended Pleadings

[HN4] Delay alone is an insufficient reason to deny leave to amend. Rather, prejudice, bad faith, or futility must accompany the delay.

Civil Procedure: Pleading & Practice: Pleadings: Amended Pleadings

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

[HN5] The appellate court reviews a district court's decision to grant or deny a party leave to amend for an abuse of discretion. Furthermore, as long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

[HN6] Fed. R. Civ. P. 12(b) provides that a motion making any Rule 12(b) defenses shall be made before pleading if a further pleading is permitted. However, Fed. R. Civ. P. 12(h)(2) provides that the defense of failure to state a claim upon which relief can be granted as set forth in Rule 12(b)(6) may be raised by motion for judgment on the pleadings, or at the trial on the merits.

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN7] The appellate court reviews the district court's dismissal de novo.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

[HN8] The purpose of a Fed. R. Civ. P. 12(b)(6) motion is to test the sufficiency of a complaint. A Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Accordingly, a Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. Furthermore, when a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, the court must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.

Governments: Local Governments: Claims By & Against

[HN9] Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.

Governments: Local Governments: Claims By & Against

[HN10] Municipalities are not liable pursuant to respondeat superior principles for all constitutional violations of their employees simply because of the employment relationship. Instead, municipal liability results only when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.

Governments: Local Governments: Ordinances & Regulations

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

[HN11] While municipal policy is most easily found in municipal ordinances, it may also be found in formal or informal ad hoc policy choices or decisions of municipal officials authorized to make and implement municipal policy.

Governments: Local Governments: Claims By & Against

[HN12] Municipal policy makers under appropriate circumstances may impose municipal liability for a single decision.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN13] A 42 U.S.C.S. § 1983 plaintiff seeking to impose municipal liability must satisfy only the usual requirements of notice pleading specified by the Fed. R. Civ. P. Thus, a plaintiff is required under Fed. R. Civ. P. 8(a)(2) to provide nothing more than a short and plain statement of his claims giving the city fair notice of what his claims are and the grounds upon which they rest. He is not required under Rule 8(a)(2) to detail the facts underlying his claims, or plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation.

Governments: Local Governments: Claims By & Against

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN14] A final decision maker's adoption of a course of action tailored to a particular situation and not intended to control decisions in later situations may, in some circumstances, give rise to municipal liability under 42 U.S.C.S. § 1983. If the decision to adopt a particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy", as that term is commonly understood. More importantly, where those who establish governmental policy direct action, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Constitutional Law: Fundamental Freedoms: Freedom of Speech

[HN15] See U.S. Const. amend. I.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN16] While a public employee does not have a constitutional right to his job, a public employer cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. It follows, therefore, that a public employer is prohibited from discharging or taking other adverse action against one of its employees on a basis that infringes the employee's constitutionally protected interest in freedom of speech. Furthermore, a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under U.S. Const. amend. I.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN17] Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of employees' speech.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN18] The threat of dismissal from public employment is a potent means of inhibiting speech.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN19] The prohibition against infringing freedom of speech under U.S. Const. amend. IV is made applicable to the states and local levels of government by U.S. Const. amend. XIV.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN20] A public employer may impose some restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large. This is because, as an employer, the government is entitled to maintain discipline and ensure harmony as necessary to the operation and mission of its agencies.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN21] In order to determine whether a public employee has a 42 U.S.C.S. § 1983 cause of action for violation of U.S. Const. amend. I right to free speech, the court must balance the interests of the public employee, as a citizen, in

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. This test is known as the Pickering balancing test.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN22] The Pickering balancing test calls for the court first to determine whether, after accepting all of plaintiff's well-pleaded allegations in his complaint as true and drawing all reasonable factual inferences from those facts in his favor, plaintiff was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest. If the court determines that he was speaking as an employee about a matter of personal interest, the analysis stops. If the court determines the opposite, however, it proceeds to ask whether, after accepting all of plaintiff's well-pleaded allegations in his complaint as true and drawing all reasonable factual inferences from those facts in his favor, plaintiff's interest in speaking upon the matter of public concern outweighed the city's interest in providing effective and efficient services to the public.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN23] With respect to a plaintiff's discipline portion of 42 U.S.C.S. § 1983 claim alleging a violation of U.S. Const. amend. I right to free speech, the court asks whether, after accepting all of plaintiff's well-pleaded allegations in his complaint as true and drawing all reasonable factual inferences from those facts in his favor, plaintiff's speech was a substantial factor in the city's decision to discipline him.

Civil Procedure: Appeals: Standards of Review: De Novo Review

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN24] Whether speech involves a matter of public concern is a question of law to be determined de novo.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN25] Speech involves a matter of public concern if it affects the social, political, or general well being of a community.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN26] Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by U.S. Const. amend. I.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN27] The public concern inquiry rests on whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee. In performing the public concern inquiry, the court must examine the content, context, and form of the employee's speech in light of the entire record.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN28] The proper use and manner of carrying a concealed handgun in North Carolina is a subject in which the public or the community is likely to be truly concerned and interested.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN29] In performing the Pickering balancing test, the court should first assess the value, from the perspective of U.S. Const. amend. I, of an employee's speech. The court should then assess the time, place, and manner of the speech at issue, as well as the context in which the dispute arose.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN30] The U.S. Supreme Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of U.S. Const. amend. I values, and is entitled to special protection.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN31] Relevant considerations as to the protection afforded a public employee's speech are: whether a statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN32] A police officer's artistic expression constitutes a matter of public concern.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN33] A police department's perceived threat of disruption to its external operations and relationships by threatened reaction to the artistic expression of an officer by offended members of the public cannot serve as justification for disciplinary action directed at that artistic expression.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN34] Because U.S. Const. amend. I provides an explicit textual source of constitutional protection against the particular sort of government behavior of which a plaintiff complains in a substantive due process claim, U.S. Const. amend. I, not the more generalized notion of substantive due process, must be the guide for analyzing the claim.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN35] The right to associate in order to express one's views is inseparable from the right to speak freely.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN36] An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. Consequently, the court has long understood as implicit in the right to engage in activities protected by U.S. Const. amend. I a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN37] A public employee's corresponding right to freedom of association is not absolute. Logically, the limitations on a public employee's right to associate are closely analogous to the limitations on his right to speak.

Constitutional Law: Equal Protection: Scope of Protection

[HN38] See U.S. Const. amend. XIV.

Constitutional Law: Equal Protection: Scope of Protection

[HN39] A pure or generic retaliation claim simply does not implicate the Equal Protection Clause under U.S. Const. amend. XIV.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN40] Qualified immunity protects government officials from civil damages in a 42 U.S.C.S. § 1983 action insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN41] In analyzing the applicability of a qualified immunity defense, the court must first identify the specific right that plaintiff asserts was infringed by the challenged conduct at a high level of particularity. The court must then consider whether at the time of the claimed violation that right was clearly established. For a right to have been clearly established, the contours of the right must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional. Lastly, the court considers whether a reasonable person in the official's position would have known that his conduct would violate that right.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN42] In determining whether a right was clearly established at the time of a claimed constitutional violation, courts in the Fourth Circuit ordinarily need not look beyond the decisions of the U.S. Supreme Court, this court of appeals, and the highest court of the state in which the case arose. If a right is recognized in some other circuit, but not in the Fourth

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Circuit, an official will ordinarily retain an immunity defense. Notably, however, the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN43] A police department's perceived threat of disruption is insufficient to justify conditioning a police officer's continued employment upon the cessation of his off-duty protected expression.

Constitutional Law: Right to Bear Arms

[HN44] See U.S. Const. amend. II.

Constitutional Law: Right to Bear Arms

[HN45] U.S. Const. amend. II does not apply to the states.

Constitutional Law: Substantive Due Process: Privacy

[HN46] There is no general constitutional right to privacy; rather, the "right to privacy" has been limited to matters of reproduction, contraception, abortion, and marriage.

COUNSEL: ARGUED: Joseph Michael McGuinness, Elizabethtown, North Carolina, for Appellant.

Patricia Lee Holland, CRANFILL, SUMNER & HARTZOG, L.L.P., Raleigh, North Carolina, for Appellees.

ON BRIEF: Gregory K. Kornegay, Wilmington, North Carolina, for Appellant.

Patrick H. Flanagan, CRANFILL, SUMNER & HARTZOG, L.L.P., Raleigh, North Carolina; W. Harrell Everett, Jr., EVERETT, WOMBLE & FINAN, L.L.P., Goldsboro, North Carolina, for Appellees.

M. Travis Payne, EDELSTEIN & PAYNE, Raleigh, North Carolina, for Amici Curiae Professional Fire Fighters, et al.

Robert Dowlut, Fairfax, Virginia, for Amicus Curiae NRA.

JUDGES: Before ERVIN and HAMILTON, Circuit Judges, and HILTON, Chief United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Hamilton wrote the opinion, in which Judge Ervin and Chief Judge Hilton joined.

OPINIONBY: HAMILTON

OPINION: [*237] OPINION

HAMILTON, Circuit Judge:

Kenneth Edwards, a sergeant in the police department[**2] for the City of Goldsboro, North Carolina, brought this civil action against the City of Goldsboro (the City), its chief of police, Chester Hill (Chief Hill), and its city manager, Richard Slozak (City Manager Slozak), alleging numerous claims under 42 U.S.C. § 1983 (§ 1983) and the North Carolina Constitution, and one claim under North Carolina common law. In his civil action, Kenneth Edwards (Sergeant Edwards) challenged the decision to suspend him for two weeks without pay and to place him on probationary status for one year following his teaching of a concealed handgun safety course when he had previously been denied permission to do so. He also challenged the decision to condition his continued employment with the police department upon his not teaching the course. The district court dismissed all of Sergeant Edwards' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Sergeant Edwards appeals, and we now affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Sergeant Edwards began his law enforcement career with the City of Goldsboro Police Department (the Department) in 1975. n1 As part of his duties [*238] with respect to[**3] the Department, Sergeant Edwards served as a certified firearms instructor for the City and as a law enforcement supervisor of officers patrolling a public housing unit.

-----Footnotes-----

n1 In presenting the facts, we accept all well-pleaded allegations in Sergeant Edwards' complaint as true and draw all reasonable factual inferences from those facts in his favor. See *infra* Part IV.

-----End Footnotes-----

On July 10, 1995, the North Carolina General Assembly ratified a bill establishing a statewide permitting program for carrying concealed handguns (the North Carolina Concealed Handgun Statute). See N.C. Gen. Stat. §§ 14-415.10 to 415.23 (Supp. 1995); William F. Lane, Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute, 74 N.C.L.Rev. 2214, 2215 (1996). One of the prerequisites for obtaining a concealed handgun permit under the North Carolina Concealed Handgun Statute is completion of "an approved firearms safety and training course which involves the actual firing of handguns and instruction[**4] in the laws of [North Carolina] governing the carrying of a concealed handgun and the use of deadly force." n2 N.C. Gen. Stat. § 14.415.12(a)(4).

-----Footnotes-----

n2 Hereinafter, we will refer to this course as the concealed handgun safety course.

-----End Footnotes-----

In early November 1995, as part of his regular employment, Sergeant Edwards attended a firearms-instructor conference at the North Carolina Justice Academy in Salemburg, North Carolina, qualifying him to be an instructor of the concealed handgun safety course. Shortly thereafter, Sergeant Edwards took steps to teach the concealed handgun safety course in his off-duty hours in an effort to earn extra money to help support his elderly mother and in an effort to express his personal views on and advocacy of firearms safety. These steps included obtaining a business permit in the name of Professional Training Services and scheduling his first class for November 29, 1995. Two days prior to his first scheduled class, on November 27, Sergeant Edwards submitted a standard application for[**5] permission to engage in off-duty employment to Chief Hill and informed Chief Hill of the upcoming class. The application explained the nature of Sergeant Edwards' proposed off-duty employment. Chief Hill informed Sergeant Edwards that he would discuss the application with the City Attorney and advise Sergeant Edwards of its status the next day. n3

-----Footnotes-----

n3 The City delegated authority to Chief Hill and City Manager Slozak to formulate, develop and administer final official employment and personnel policies and practices of the City.

-----End Footnotes-----

On November 28, 1995, Chief Hill issued a memorandum addressed to Sergeant Edwards denying his application for off-duty employment. In relevant part, the memorandum states as follows:

At the present the issue of carrying a concealed handgun is a very sensitive and controversial issue. Most important, it is my duty and obligation as Chief of the Goldsboro Police Department to do what is in the best interest of the

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

department. Therefore, I am denying your request for off duty employment [**6] as it relates to the educational training for civilians in firearms courses (carry concealed handguns).

(J.A. 35). On November 29, 1995, Chief Hill also verbally informed Sergeant Edwards that his application for permission to engage in off-duty employment was denied. n4

-----Footnotes-----

n4 Chief Hill believed the North Carolina Concealed Handgun Statute was a "bad law." (J.A. 108). Indeed, Chief Hill had personally lobbied against the statute prior to its enactment.

-----End Footnotes-----

In response, Sergeant Edwards canceled his first scheduled class and filed a grievance with Major Hobbs of the Department, the Major of Support Services, on November 30, complaining about the denial of his application. Sergeant Edwards addressed the grievance to Major Hobbs in compliance with the chain of command and Department personnel policy. Major Hobbs [*239] responded in writing the same day that he lacked authority to approve the application.

On December 4, 1995, Chief Hill officially notified Sergeant Edwards by letter that his application for permission[**7] to engage in off-duty employment was denied because "carrying concealed weapons is a very sensitive and controversial issue." (J.A. 109). On December 6, 1995, without any explanation or advance notice, Chief Hill transferred Sergeant Edwards from the position of supervisor of the public housing unit, a position he had held for four years, to the position of line sergeant.

On December 9 and 10, 1995, while off-duty, Sergeant Edwards conducted classes with respect to the concealed handgun safety course at a "private place without any connection to the City." (J.A. 110). Then on December 18 and 19, 1995, he requested a hearing before a grievance panel, pursuant to the City's personnel rules and regulations, to address Chief Hill's denial of his application for permission to engage in off-duty employment. Sergeant Edwards made the request through Chief Hill and City Manager Slozak.

On December 19, 1995, Major Isler notified Sergeant Edwards by telephone to be at Chief Hill's office the next day for a meeting, but told him that he (Major Isler) did not know what the meeting was about. The meeting indeed took place the following day with the following persons in attendance: (1) Chief [**8]Hill; (2) Major Hobbs; (3) Major Isler; (4) the City Attorney, Harrell Everett (Everett); and (5) Sergeant Edwards, who was not represented by counsel. At the meeting, without giving Sergeant Edwards notice or an opportunity to be heard, Chief Hill abruptly began reading aloud a letter of suspension and probation dated December 20, 1995. In sum, the letter stated: (1) that Chief Hill had advised Sergeant Edwards that his application for permission to engage in off-duty employment was denied as not in the best interest of the Department; (2) Sergeant Edwards engaged in the very type of off-duty employment for which he was denied permission to engage; (3) as a result, Sergeant Edwards was suspended for two weeks without pay and placed on probation for one year; and (4) if Sergeant Edwards again engaged in secondary employment without permission, Chief Hill would recommend his immediate termination as an employee of the City.

On January 17, 1996, a grievance hearing by the City's grievance panel was held at City Hall regarding the entire matter, with the following persons in attendance: (1) Chief Hill; (2) Major Hobbs; (3) Everett; (4) the City's personnel director, Al King; (5) a clerk[**9] for the City, (6) the chairman of the City's grievance panel, Jack Cannon; (7) two employees of the City; (8) two private citizens; and (9) Sergeant Edwards. On January 22, 1996, the City's grievance panel met without Sergeant Edwards being present. At the meeting, the City's grievance panel ratified Chief Hill's decision to deny Sergeant Edwards' application for permission to engage in secondary employment for the reasons cited by Chief Hill, and thereby impliedly affirmed Chief Hill's suspension of Sergeant Edwards and placement of him on probation for one year.

On January 30, 1996, City Manager Slozak sent a letter to Sergeant Edwards upholding the City's grievance panel's decision. This decision by City Manager Slozak served as the final decision of the City regarding Sergeant Edwards'

application for permission to engage in off-duty employment and the discipline he suffered as a result of engaging in such off-duty employment without permission.

Chief Hill, City Manager Slozak, and the City (collectively the Defendants) have allowed other City employees to engage in off-duty employment and self-employment "and have condoned and ratified such employment without punishment or with[**10] substantially less severe or insignificant punishment." (J.A. 114). Sergeant Edwards' [*240] complaint lists ten similarly situated employees of the City by name whom the Defendants allowed to engage in various types of off-duty self employment (e.g., consulting on land-use matters, installing tile, and teaching political science at a community college). One of these employees happens to be Chief Hill, who engages in off-duty self-employment as an income tax preparer.

On May 24, 1996, Sergeant Edwards filed this action against the Defendants in the United States District Court for the Eastern District of North Carolina. Fairly construed, the complaint alleged a total of seventeen causes of action against the Defendants, with nine brought pursuant to § 1983 and arising under the United States Constitution, seven arising under the North Carolina Constitution, and one arising under North Carolina's common law. The nine claims brought pursuant to § 1983 were: (1) violation of the right to free speech; (2) violation of the right to free association; (3) violation of the right to substantive due process; (4) violation of the right to procedural due process; (5) violation of the right to[**11] privacy; (6) violation of the right to bear arms; (7) violation of the right to equal protection; (8) deprivation of occupational liberty interests; and (9) violation of the right to academic freedom. n5 The seven claims under the North Carolina Constitution were: (1) violation of the right to free speech; (2) violation of the right to free association; (3) violation of the right to substantive due process; (4) violation of the right to procedural due process; (5) violation of the right to bear arms; (6) violation of the right to equal protection; and (7) deprivation of occupational liberty interests. The claim under North Carolina's common law alleged that the Defendants' conduct, as alleged in the complaint, contravened the North Carolina public policy exception to the North Carolina at-will employment doctrine.

-----Footnotes-----

n5 With respect to these § 1983 claims, Sergeant Edwards sued Chief Hill and City Manager Slozak in their individual as well as their official capacities.

-----End Footnotes-----

According to Sergeant Edwards, in punishing[**12] him for teaching the concealed handgun safety class, the Defendants intentionally, willfully and maliciously singled him out for adverse discriminatory treatment, "because of the content of his firearms course and advocacy, because of [Chief] Hill's personal and political zeal to oppose the lawful possession of firearms and because of [Chief] Hill's desire to promote his own personal political agenda." (J.A. 102). "The acts complained of and edicts of Defendants Hill and Slozak represent the official policy of the City." (J.A. 104).

Sergeant Edwards alleged that the Defendants' conduct has caused him to be deprived of wages and other benefits of his employment, including opportunities for promotion. Furthermore, he alleged the Defendants' conduct has caused him to suffer anxiety, emotional distress, humiliation, embarrassment, loss of enjoyment of life, loss of future employment prospects, and has permanently and adversely affected his life and career.

On July 31, 1996, the Defendants filed their answer, alleging, among other defenses, various immunities including governmental, sovereign, and qualified immunity. After a significant amount of discovery had taken place, on March [**13]10, 1997, the Defendants filed a Rule 12(b)(6) motion to dismiss. On April 1, 1997, without ruling on the Defendants' Rule 12(b)(6) motion, the district court set the case for trial on October 20, 1997.

On April 4, 1997, Sergeant Edwards filed a motion to stay the district court from ruling on the Defendants' Rule 12(b)(6) motion and to convert such motion into a motion for summary judgment. On the same day, Sergeant Edwards filed a motion for leave to file an amended complaint in order to conform his complaint to the evidence. On June 7, 1997, Sergeant [*241] Edwards reapplied for permission to teach the handgun safety course. He directed his request to Chief Hill, City Manager Slozak, and Major Szatkowski.

On June 17, 1997, the district court impliedly denied Sergeant Edwards' motion to convert the Defendants' Rule 12(b)(6) motion into a summary judgment motion by ordering that the deadline for filing any motions for summary judgment was extended until forty-five days after receipt of its ruling on the Rule 12(b)(6) motion. On August 25, 1997, Chief Hill, City Manager Slozak, and Major Szatkowski denied Sergeant Edwards' second formal request for permission to teach the concealed handgun[**14] safety course. On October 7, 1997, Sergeant Edwards filed a motion for leave to file a second amended complaint in order to add the following paragraph:

On June 9, 1997, Plaintiff again reapplied for permission to engage in off-duty self employment consisting of instructional classes for civilians, including firearms training and the concealed carry course. Plaintiff directed his request to Defendants Slozak, Hill and Major Szatkowski. Over two months later, on August 25, 1997, Defendants disapproved Plaintiff's request to teach.

(J.A. 98).

In a published opinion dated October 16, 1997, the district court granted the Defendants' Rule 12(b)(6) motion in toto. See *Edwards v. City of Goldsboro*, 981 F. Supp. 406 (E.D.N.C. 1997). On October 20, 1997, the district court entered final judgment in favor of the Defendants. On October 24, 1997, Sergeant Edwards filed a motion for clarification or reconsideration of the district court's decision to grant the Defendants' Rule 12(b)(6) motion. Sergeant Edwards sought clarification as to whether the district court had dismissed his original complaint or one of his amended complaints. In a short order filed November 10, [**15] 1997, the district court denied Sergeant Edwards' motion for reconsideration and clarified that it had dismissed the original complaint, without ruling on Sergeant Edwards' motions to amend. In the same order, the district court then denied both motions to amend without explanation. This timely appeal followed.

On appeal, Sergeant Edwards challenges the district court's denial of his motions to amend his complaint. He also challenges the district court's dismissal of all of his § 1983 claims arising under the United States Constitution and his claim arising under the North Carolina Constitution alleging abridgment of his occupational liberty interest. n6

-----Footnotes-----

n6 [HN1] Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of an appellant's opening brief must contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies" *Id.* Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal. See *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 993 n.7 (4th Cir. 1995) (en banc) (involving predecessor to Federal Rule of Appellate Procedure 28(a)(9)(A)).

Here, Sergeant Edwards has failed to comply with the dictates of Federal Rule of Appellate Procedure 28(a)(9)(A) with respect to all of his North Carolina claims except for his claim premised upon the North Carolina Constitution that the Defendants deprived him of his occupational liberty interest. Accordingly, we consider him to have abandoned all of his North Carolina claims except this latter claim. See *Rosenberger v. Rector and Visitors*, 18 F.3d 269, 276-77 (4th Cir. 1994), *rev'd on other grounds*, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).

-----End Footnotes-----

[**16]

II

Sergeant Edwards first contends that the district court abused its discretion in denying his motions to amend, because the amended complaints merely sought to conform the pleadings to the evidence and clarify the complaint with more specific facts as a result of admissions made in discovery and did not prejudice the Defendants. We agree.

[*242] [HN2] Under Federal Rule of Civil Procedure 15(a), leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has declared that "this mandate is to be heeded." *Foman*

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). [HN3] The law is well settled "that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986). [HN4] Delay alone is an insufficient reason to deny leave to amend. See id. Rather, the delay must be accompanied by prejudice, bad faith, or futility. See id.

[HN5] We review a district court's decision to grant or deny a party leave to amend for an abuse of discretion. See *Healthsouth Rehabilitation Hosp. v. American Nat'l Red Cross*, 101 F.3d 1005, 1010 (4th Cir. 1996). Furthermore, as long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion. See id.

In this case, Sergeant Edwards first sought leave to amend his complaint in order to address a technical state law immunity issue regarding the waiver of state law immunity due to the purchase of liability insurance and to add some further allegations of fact to the complaint based upon discovery admissions. Primarily, the additional facts dealt with more examples of the City's employees engaging in off-duty self-employment, including the teaching of political science at a community college and the teaching of a self-defense course.

Sergeant Edwards filed his second motion for leave to amend his complaint on October 7, 1997. The purpose of his second amended complaint was to add the additional facts allegedly showing that on August 25, 1997, Chief Hill, City Manager Slozak, and Major Szatkowski denied Sergeant Edwards' renewed application to teach the concealed handgun safety course. [**18] The Defendants contend the record clearly reflects two obvious reasons for the denial of Sergeant Edwards' motions to amend--delay and prejudice caused by the delay. With respect to prejudice, the Defendants argue that if the district court allowed the amendments, they would have been required to expend a tremendous amount of time and money through discovery and additional research in order to address Sergeant Edwards' new allegations. The Defendants do not contend Sergeant Edwards made the motions in bad faith or that the amendments would have been futile.

Sergeant Edwards counters that the delay was unavoidable, because all of the information that he sought to add was unavailable to him until after his original complaint had been filed. For example, Sergeant Edwards asserts that he could not in good faith have pled liability insurance coverage on the part of the City, thereby triggering a waiver of governmental immunity with respect to his state law claims, until he learned of the fact in discovery. As a second example, Sergeant Edwards asserts that he could not have pled the facts regarding the Defendants' denial of his renewed request to conduct the concealed handgun safety course [**19] until such events actually took place. He also counters that the potential for prejudice to the Defendants is lacking because: (1) all of the allegations sought to be added in his first amended complaint derived from evidence obtained during discovery regarding matters already contained in the complaint in some form and, except for the allegation that the City carried liability insurance, merely added specificity to those matters; (2) the statute of limitations had not yet run on any parallel claims premised upon his renewed application for permission to engage in off-duty employment; and (3) any parallel claims arose out of the same employment relationship and the same [*243] type of factual circumstances as his other claims.

We are persuaded by Sergeant Edwards' contentions that the district court abused its discretion in denying his motions to amend his complaint, because even assuming arguendo that Sergeant Edwards delayed in filing his motions to amend, that the Defendants would have been prejudiced by the amendments sought is not obvious from the record as the Defendants contend. See Johnson, 785 F.2d at 509. As Sergeant Edwards correctly points out, all of the allegations [**20] sought to be added in his first amended complaint derived from evidence obtained during discovery regarding matters already contained in the complaint in some form and, except for the allegation that the City carried liability insurance, merely sought to add specificity to those matters. Prejudice to the Defendants could hardly flow from such an addition. As for the factual allegations regarding Sergeant Edwards' renewed application for permission to engage in off-duty employment, they arise from the same controversy as the balance of the complaint. Because the statute of limitations had not yet barred Sergeant Edwards from asserting any parallel claims based upon these factual allegations against the Defendants, their inclusion in this lawsuit promotes judicial economy given that all of the legal issues would be identical. In short, that the Defendants would suffer prejudice if both motions to amend were allowed is pure speculation. Accordingly, we reverse the district court's denial of Sergeant Edwards' motions to amend his complaint.

III.

Prior to addressing the propriety of the district court's grant of the Defendants' motion to dismiss Sergeant Edwards' action, we must first^[**21] address a procedural matter not raised by any party. ⁿ⁷ The Defendants designated their motion as one for dismissal pursuant to Rule 12(b)(6), and the district court treated it as such, even though the Defendants had already answered the original complaint.

-----Footnotes-----

ⁿ⁷ Given our reversal of the district court's denial of Sergeant Edwards' motions to amend his complaint, from now on we will consider Sergeant Edwards' second amended complaint as the complaint dismissed by the district court.

-----End Footnotes-----

[HN6] Rule 12(b) provides that "[a] motion making any [Rule 12(b)] defenses shall be made before pleading if a further pleading is permitted." Fed. R. Civ. P. 12(b). However, Rule 12(h)(2) provides that the defense of failure to state a claim upon which relief can be granted as set forth in Rule 12(b)(6) may be raised "by motion for judgment on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2); see 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 at 514-15 (2d ed. 1990). ^[**22] Therefore, as a matter of motions practice, the Defendants' motion should be viewed as a Rule 12(c) motion for judgment on the pleadings raising the defense of failure to state a claim upon which relief can be granted. See *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 182 (7th Cir. 1986). However, viewing the Defendants' motion as a Rule 12(c) motion does not have a practical effect upon our review, because [HN7] we review the district court's dismissal de novo and in doing so apply the standard for a Rule 12(b)(6) motion. See *Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996); *Turbe v. Government of the V.I.*, 938 F.2d 427, 428 (3d Cir. 1991); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987); *Republic Steel Corp.*, 785 F.2d at 182; 5A Wright & Miller, supra, § 1367 at 515.

IV.

[HN8] The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; "importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin*, 980 F.2d 943, 952 (4th ^[*244] Cir. 1992). Accordingly, a Rule 12(b)(6) motion should only be granted^[**23] if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. See *id.* Furthermore, when as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, "we must be especially solicitous of the wrongs alleged" and "must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) (internal quotation marks omitted) (emphasis added). We do note, however, that for purposes of Rule 12(b)(6), we are not required to accept as true the legal conclusions set forth in a plaintiff's complaint. See *District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979).

With these principles in mind, we turn to consider the propriety of the district court's dismissal of Sergeant Edwards' various^[**24] claims.

V.

Sergeant Edwards contends that the district court erroneously relied on *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), in dismissing his claims against the City and Chief Hill and City Manager Slozak in their official capacities. Treating Chief Hill and City Manager Slozak in their official capacities as the City, we agree. ⁿ⁸

-----Footnotes-----

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

n8 Sergeant Edwards' claims against Chief Hill and City Manager Slozak must be treated as claims against the City. See *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) (" [HN9] Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent . . . ") (internal quotation marks omitted). Thus, for purposes of this issue, we only refer to the City as the defendant.

-----End Footnotes-----

Under *Monell*, [HN10] municipalities are not liable pursuant to respondeat superior principles for all constitutional violations of their employees simply [**25] because of the employment relationship. See *Monell*, 436 U.S. at 692-94. Instead, municipal liability results only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" *Id.* at 694. [HN11] While municipal policy is most easily found in municipal ordinances, "it may also be found in formal or informal ad hoc 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy." *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987); see also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (" [HN12] Municipal liability may be imposed for a single decision by municipal policy makers under appropriate circumstances."). n9 [HN13] "[A] § 1983 plaintiff seeking to impose municipal liability must satisfy [**245] only the usual requirements of notice pleading specified by the Federal Rules." *Jordan v. Jackson*, 15 F.3d 333, 339 (4th Cir. 1994). Thus, Sergeant Edwards was required under Federal Rule of Civil Procedure 8(a)(2) to provide nothing more than a short and plain statement of his [**26] claims giving the City fair notice of what his claims are and the grounds upon which they rest. See *id.* He is not required under Rule 8(a)(2) to "detail the facts underlying his claims," or "plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation." *Jordan*, 15 F.3d at 339.

-----Footnotes-----

n9 *Pembaur* concerned a decision by a county prosecutor, acting as the county's final decision maker to direct county deputies to forcibly enter the petitioner's place of business to serve capias upon third parties. See 475 U.S. at 485. The Supreme Court held that the county could be liable under § 1983, holding that [HN14] a final decision maker's adoption of a course of action "tailored to a particular situation and not intended to control decisions in later situations" may, in some circumstances, give rise to municipal liability under § 1983. *Pembaur*, 475 U.S. at 481; see also *Board of County Comm'rs v. Brown*, 520 U.S. 397, 405-06, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997) (affirming this reading of *Pembaur*). Elaborating, the Court stated:

If the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Pembaur, 475 U.S. at 481 (footnote omitted).

-----End Footnotes-----

[**27]

Applying these pleading principles to Sergeant Edwards' second amended complaint reveals that it contains sufficient allegations to avoid dismissal of his § 1983 claims against the City under *Monell*. Sergeant Edwards' second amended complaint alleges that the City delegated authority to its agents and employees, including Chief Hill and City Manager Slozak, to formulate, develop and administer employment and personnel policies and practices for the City, including those policies and practices that caused Sergeant Edwards the damages he has alleged. The second amended complaint further alleges that the acts complained of and edicts of Chief Hill and City Manager Slozak represent official policy of the City, and that City Manager Slozak's decision to uphold and ratify Chief Hill's decision to deny Sergeant Edwards the right to teach the concealed handgun safety course was a final decision of the City. We have no doubt that these

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

allegations are sufficient to avoid a Rule 12(c) dismissal of Sergeant Edwards' § 1983 claims against the City pursuant to the authority of Monell. Accordingly, we hold the district court erred as a matter of law in dismissing all of Sergeant Edwards' [**28] § 1983 claims against the City pursuant to the authority of Monell.

VI.

We next address Sergeant Edwards' contention that the district court erred in dismissing his § 1983 claim alleging the Defendants violated his right to free speech as guaranteed by the First Amendment by: (1) suspending him for two weeks without pay and placing him on probation for one year in retaliation for exercising his claimed rights under the First Amendment to teach the concealed handgun safety course while off-duty and to express his views regarding firearms safety while off-duty; and (2) by threatening him with termination if he resumed teaching the concealed handgun safety course. We agree that Sergeant Edwards' second amended complaint states a claim upon which relief can be granted for violation of his right to free speech as guaranteed by the First Amendment. See Fed. R. Civ. P. 12(b)(6).

The First Amendment provides, in pertinent part, that [HN15] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. n10 [HN16] While a public employee does not have a constitutional right to his job, a public employer "cannot condition public employment on a basis that infringes the[**29] employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). It follows, therefore, that a public employer is prohibited from discharging or taking other adverse action against one of its employees on a basis that infringes the employee's constitutionally [*246] protected interest in freedom of speech. See *Rankin v. McPherson*, 483 U.S. 378, 383, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); see also *id.* at 384 (" [HN17] Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."). Furthermore, of relevance in the present appeal, a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment. See *id.* at 384 (" [HN18] 'The threat of dismissal from public employment is . . . a potent means of inhibiting speech.'" (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 574, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968))); *Connick*, 461 U.S. at 144-45.

-----Footnotes-----

n10 [HN19] This prohibition is made applicable to the States and local levels of government by the Fourteenth Amendment. See *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997) (en banc).

-----End Footnotes-----

[**30]

However, in the public employment context, [HN20] a public employer "may impose some restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 465, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995). This is because "as an employer, the government is entitled to maintain discipline and ensure harmony as necessary to the operation and mission of its agencies." *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998).

[HN21] In order to determine whether a public employee such as Sergeant Edwards has a § 1983 cause of action for violation of his First Amendment right to free speech, we must balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. This test is known as the *Pickering* balancing test. [HN22] In the posture of the present appeal, this test calls us first to determine whether, after accepting all of Sergeant Edwards' well-pleaded[**31] allegations in his second amended complaint as true and drawing all reasonable factual inferences from those facts in his favor, Sergeant Edwards was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest. See *Arvinger v. Mayor and City Council*, 862 F.2d 75, 77 (4th Cir. 1988). If we determine that he was speaking as an employee about a matter of personal interest, rather than as a citizen on a matter of public concern, our analysis stops. See *id.* If we determine the opposite, however, we proceed to ask whether, after accepting all of Sergeant Edwards' well-pleaded allegations in his second amended complaint as true and drawing all reasonable factual inferences from those facts in his favor, Sergeant

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Edwards' interest in speaking upon the matter of public concern outweighed the City's interest in providing effective and efficient services to the public. See *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). [HN23] With respect to the discipline portion of Sergeant Edwards' § 1983 claim alleging a violation of his First Amendment right to free speech, if we answer yes to this question, we then ask whether, [**32] after accepting all of Sergeant Edwards' well-pleaded allegations in his second amended complaint as true and drawing all reasonable factual inferences from those facts in his favor, Sergeant Edwards' speech was a substantial factor in the City's decision to suspend him for two weeks without pay and discipline him. See *id.* We now undertake this analysis.

[HN24] Whether speech involves a matter of public concern is a question of law to be determined *de novo*. See *Arvinger*, 862 F.2d at 77. [HN25] Speech involves a matter of public concern if it affects the social, political, or general well-being of a community. See *Connick*, 461 U.S. at 146. [HN26] "Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by the First Amendment . . ." *Stroman*, [*247]981 F.2d at 156. We have explained that the answer to [HN27] the public concern inquiry rests on "whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee." [**33] *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985) (internal quotation marks omitted). In performing the public concern inquiry, we must examine the content, context, and form of the employee's speech in light of the entire record. See *Connick*, 461 U.S. at 147-48.

We conclude the speech at issue is a matter of public concern. After examining the content, context, and form of Sergeant Edwards' speech as alleged in his second amended complaint, we have no doubt that [HN28] the proper use and manner of carrying a concealed handgun in North Carolina is a subject in which "the public or the community is likely to be truly concerned" and "interested." *Berger*, 779 F.2d at 999 (internal quotation marks omitted). The content is of obvious concern to citizens on both sides of the often hotly debated issues surrounding the right of ordinary citizens to carry a concealed handgun. Furthermore, the context of Sergeant Edwards' speech, an instructional setting for members of the public, obviously weighs heavily in favor of concluding his speech is a matter of public concern. The same is true for the form of his speech, presumably verbal as well as some written instruction accompanied by [**34] physical demonstrations. Having concluded the speech at issue was entitled to protection against the challenged actions of the Defendants, we now turn to consider whether those actions could be justified under the Pickering balancing test. We now, therefore, ask whether, after accepting all of Sergeant Edwards' well-pleaded allegations in his second amended complaint as true and drawing all reasonable factual inferences from those facts in his favor, Sergeant Edwards' interest in speaking upon the proper use and manner of carrying a concealed handgun in North Carolina outweighed the City's interest in providing effective and efficient services to the public. See *Stroman*, 981 F.2d at 156. [HN29] In performing this balancing test, this court has recognized that we should first assess the value, from the First Amendment perspective, of the employee's speech. See *Berger*, 779 F.2d at 999 (holding that in performing the Pickering balancing test, the district court was proper in first assessing the value, from the First Amendment perspective, of the employee's speech). We should then assess the time, place, and manner of the speech at issue, as well as the context in which the dispute [**35] arose. See *Rankin*, 483 U.S. at 388.

Here, the speech at issue is on a categorically public issue, the proper method of safely carrying a concealed handgun, knowledge of which is a prerequisite to obtaining a state permit to carry a concealed handgun. Because the speech at issue is on a categorically public issue, it occupies the highest rung of the hierarchy of First Amendment values. See *Connick*, 461 U.S. at 145 (stating that the [HN30] Supreme "Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982), and *Carey v. Brown*, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980)).

We next assess the time, place, and manner of the speech at issue, as well as the context in which the dispute arose. See *Rankin*, 483 U.S. at 388. In this regard, [HN31] relevant considerations are "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are [**36] necessary, or impedes the performance of the speaker's [*248] duties or interferes with the regular operation of the enterprise." *Id.*

Here, the speech was and would always be made while Sergeant Edwards was off-duty, at a location unrelated to the City, and in an instructional manner. There are no facts indicating that Sergeant Edwards did or would offer any

comment on the Department's policies or operations, make any reference to any other member of the Department, or claim to be speaking for or in any way on behalf of the Department. There is also no indication at this early pleading stage that Sergeant Edwards' teaching of the concealed handgun safety course would impair the discipline by superiors or harmony among co-workers, would have a detrimental impact on any close working relationships for which personal loyalty and confidence are necessary, or would impede the performance of Sergeant Edwards' duties or interfere with the regular operation of the Department. Indeed, at this early pleading stage, we cannot discern any legitimate interest of the Defendants in preventing a police officer of the City from conducting a concealed handgun safety course for the public that is a creature[**37] of state law. Furthermore, because we are at the Rule 12(c) stage of this litigation, we must accept as true Sergeant Edwards' allegation that he was denied permission to teach the handgun safety course "because of [Chief] Hill's personal and political zeal to oppose the lawful possession of firearms and because of [Chief] Hill's desire to promote his own personal political agenda," (J.A. 102), rather than any legitimate concern for the operational efficiency of the Department. For these reasons, we hold that at this early pleading stage, the Pickering balancing test weighs in favor of Sergeant Edwards.

The second amended complaint leaves no doubt that the Defendants' threat to terminate Sergeant Edwards, if he resumed conducting the concealed handgun safety course, was intended to chill his right to engage in what we have just determined, at least at this early pleading stage, is protected expression. Accordingly, the threat is actionable. See Rankin, 483 U.S. at 384; Connick, 461 U.S. at 144-45. With respect to the discipline portion of Sergeant Edwards' First Amendment claim, we hold that, after accepting all of Sergeant Edwards' well-pleaded allegations in his[**38] second amended complaint as true and drawing all reasonable factual inferences from those facts in his favor, the content of Sergeant Edwards' speech in teaching the concealed handgun safety course was a substantial factor in the City's decision to suspend him for two weeks without pay and place him on one year of probation. n11 [*249] Our decision to let Sergeant Edwards' § 1983 claim alleging a violation of his First Amendment right to free speech go forward past the initial pleading stage is fully supported by our Pickering analysis in Berger. In that case, we held on appeal from a bench trial that the Baltimore Police Department could not condition the continued employment of one of its officers upon his cessation of off-duty public entertainment performances in blackface that members of Baltimore's black community found offensive. See Berger, 779 F.2d at 1002. In reaching this holding, we concluded that [HN32] the police officer's artistic expression constituted a matter of public concern. See id. at 999-1000. On the balancing portion of the Pickering test, we held that [HN33] the police department's perceived threat of disruption to its external operations and relationships by[**39] threatened reaction to the artistic expression by offended members of the public could not serve as justification for disciplinary action directed at that artistic expression. See id. at 1001. The present case is analogous to Berger in two critical respects. First, in both cases the speech and/or expressive conduct was performed off-duty by a police officer at a location unconnected to the police department. Second, in neither case was there any indicia of disruption or likely disruption of the internal operations of the police department.

-----Footnotes-----

n11 We note that Sergeant Edwards alleges a separate claim that the Defendants violated his Fourteenth Amendment right to substantive due process. Sergeant Edwards' substantive due process claim fully overlaps his free speech claim. [HN34] Because the First Amendment "provides an explicit textual source of constitutional protection against" the particular sort of government behavior of which he complains in his substantive due process claim, the First Amendment, "not the more generalized notion of substantive due process, must be the guide for analyzing" his claim. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1714, 140 L. Ed. 2d 1043 (1998) (internal quotation marks omitted). Accordingly, we affirm the district court's dismissal of Sergeant Edwards' separate substantive due process claim.

We also note that Sergeant Edwards alleges a separate § 1983 claim that the Defendants violated his alleged First Amendment right to academic freedom. Although the Supreme Court declared over thirty years ago that academic freedom is a "special concern of the First Amendment," *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967), the case law to follow on the subject has left us in murky waters. Nevertheless, under the facts as alleged in Sergeant Edwards' second amended complaint, his academic freedom claim fully overlaps his free speech claim. As with Sergeant Edwards' substantive due process claim, we look to the textual source of the claim, here the First Amendment, and not to the more generalized notion of academic freedom, to analyze this claim. Accordingly, we affirm the district court's dismissal of Sergeant Edwards' separate academic freedom claim.

-----End Footnotes-----

[**40]

In sum, we hold the district court erred in dismissing Sergeant Edwards' § 1983 claim alleging a violation of his First Amendment right to free speech.

VII.

Sergeant Edwards next claims the district court erred in dismissing his freedom of association claim. We agree.

Sergeant Edwards' freedom of association claim parallels his free speech claim. Indeed, we have recognized [HN35] "the right to associate in order to express one's views is 'inseparable' from the right to speak freely." *Cromer v. Brown*, 88 F.3d 1315, 1331 (4th Cir. 1996) (quoting *Thomas v. Collins*, 323 U.S. 516, 530, 89 L. Ed. 430, 65 S. Ct. 315 (1945)). As the Supreme Court explained in *Roberts v. United States Jaycees*, 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984):

[HN36] An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a cor responding right to associate[**41] with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Id. at 622; see also *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460-61, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958).

However, as in the public employee freedom of speech context, [HN37] a public employee's corresponding right to freedom of association is not absolute. Logically, the limitations on a public employee's right to associate are "closely analogous" to the limitations on his right to speak. *Wilton v. Mayor & City Council*, 772 F.2d 88, 91 (4th Cir. 1985).

In his second amended complaint, Sergeant Edwards alleges that in addition to teaching the statutorily required information during his concealed handgun safety course, he intended to express his personal views on and advocacy of firearms safety. He also alleges that the Defendants infringed on his associational rights "because of [Chief] Hill's personal and political zeal to oppose the lawful possession of firearms and because of [Chief] Hill's desire to promote his own personal political agenda." (J.A. 102). Obviously, as in the free speech context, these are not governmental interests[**42] at all, let alone governmental [*250] interests that are sufficient to outweigh Sergeant Edwards' interest in associating for the purpose of personal expression on a matter of public concern. Accordingly, we hold Sergeant Edwards states a freedom of association claim.

VIII.

Sergeant Edwards next contends the district court erred in dismissing his equal protection claim. We disagree.

The Fourteenth Amendment's Equal Protection Clause provides that [HN38] "no State shall . . . deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. In part, Sergeant Edwards' equal protection claim is best characterized as a mere rewording of his First Amendment retaliation claim, which we have already held survives the Defendants' motion to dismiss. [HN39] "A pure or generic retaliation claim, however, simply does not implicate the Equal Protection Clause." *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997).

In addition to a retaliation theory of liability under the Equal Protection Clause, Sergeant Edwards urges this court to recognize a novel theory in our circuit of liability under the Equal Protection Clause. Relying primarily on the Seventh Circuit's decision[**43] in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), Sergeant Edwards urges us to recognize that the Equal Protection Clause is violated when a government and/or government official selectively enforces a policy or regulation against an individual, who is not a member of an identifiable group, merely because the government and/or government official harbors animosity towards the individual. See *id.* at 179-180 (holding that "if the power of

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court" under the Equal Protection Clause even though the individual is not a member of an identifiable group). The present case does not require us to resolve whether such a theory of liability under the Equal Protection Clause is viable in our circuit, because Sergeant Edwards has not alleged that the Defendants disciplined him because they harbored animosity toward him personally. Rather, all allegations in the complaint point to the conclusion that the discipline was in retaliation for Sergeant Edwards' exercise of his rights to free speech and[**44] freedom of association under the First Amendment. In sum, the district court did not err in dismissing Sergeant Edwards' equal protection claim.

IX.

Chief Hill and City Manager Slozak alternatively seek to have us affirm the district court's dismissal of Sergeant Edwards' § 1983 claims against them in their individual capacities on the basis that they are entitled to qualified immunity. Although Chief Hill and City Manager Slozak each raised qualified immunity as a basis for dismissal below, the district court did not address qualified immunity in light of its dismissal of Sergeant Edwards' § 1983 claims on the merits. Because the only two claims that we have held should go forward are Sergeant Edwards' free speech and freedom of association claims under the First Amendment, those are the only two claims which necessitate qualified immunity analysis. On those two claims, we hold that Chief Hill and City Manager Slozak are not entitled to qualified immunity at this time.

[HN40] Qualified immunity protects government officials from civil damages in a § 1983 action "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person [**45] would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); see *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc). [HN41] In analyzing the applicability of a qualified immunity defense, [*251] we must first identify the specific right that the plaintiff asserts was infringed by the challenged conduct at a high level of particularity. See *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). We must then consider whether at the time of the claimed violation that right was clearly established. See *id.* For a right to have been clearly established, "the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991) (quoting *Anderson*, 483 U.S. at 640). [HN42] In determining whether a right was clearly established at the time of the claimed violation, "courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose[**46]" *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (en banc). "If a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense." *Id.* Notably, however, the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity. See *id.* at 708. In analyzing the applicability of the qualified immunity defense, we lastly consider whether a reasonable person in the official's position would have known that his conduct would violate that right. See *Anderson*, 483 U.S. at 639; *Taylor*, 81 F.3d at 433.

Stated at the appropriate level of particularity, the first right allegedly violated by Chief Hill and City Manager Slozak is the right of a police officer to express his personal views on a matter of public concern in an off-duty employment setting without incurring discipline from his employer or being threatened with termination motivated solely by the police chief's personal and political zeal to oppose the lawful possession of firearms and because of the police chief's desire to promote his own personal political agenda. We need not look[**47] further than our December 20, 1985 decision in *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), in order to determine whether the right at issue was clearly established. As previously stated, in *Berger*, we held the First Amendment prevented the Baltimore Police Department from conditioning the continued employment of one of its officers upon his cessation of off-duty public entertainment performances based upon the police department's perceived threat of disruption to its external operations and relationships by threatened reaction to the officer's artistic expression by offended members of the public. See *id.* at 1001. Given that on December 20, 1985, it was clearly established that [HN43] a police department's perceived threat of disruption is insufficient to justify conditioning a police officer's continued employment upon the cessation of his off-duty protected expression, we have no trouble concluding that in November 1995 it was clearly established that a police chief's personal distaste of the content of a police officer's off-duty instruction regarding concealed handgun safety is insufficient to justify conditioning a police officer's continued employment upon the[**48] cessation of his protected off-duty expression. We also have no trouble in concluding that a reasonable person in either Chief Hill or City Manager

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Slozak's position would have known that his conduct would violate that right. Accordingly, qualified immunity on Sergeant Edwards' § 1983 free speech claim under the First Amendment is inappropriate at this early pleading stage of the litigation.

We now turn to Sergeant Edwards' freedom of association claim. Stated at the appropriate level of inquiry, the right alleged is the right of a police officer to associate with other persons while off-duty in order to express his views on a matter of public concern without incurring discipline from his employer or being threatened with termination motivated solely by the police chief's personal and [*252] political zeal to oppose the lawful possession of firearms and because of the police chief's desire to promote his own personal political agenda. We concluded, *supra*, that this right in the free speech context was clearly established in November 1995. We also know from the Supreme Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), that[**49] in November 1995 it was clearly established that implicit in the right to engage in activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. Accordingly, logic dictates that the right of a police officer to associate with other persons while off-duty in order to express his personal views on a matter of public concern without incurring discipline from his employer or being threatened with termination motivated solely by the police chief's personal and political zeal to oppose the lawful possession of firearms and because of the police chief's desire to promote his own personal political agenda was clearly established in November 1995. Again, we have no trouble in concluding that a reasonable person in either Chief Hill or City Manager Slozak's position would have known that his conduct would violate that right. Therefore, qualified immunity on Sergeant Edwards' § 1983 freedom of association claim under the First Amendment is also inappropriate at this early pleading stage of the litigation.

X.

Sergeant Edwards' challenge to[**50] the district court's dismissal of his § 1983 claims alleging a violation of his Second Amendment right to bear arms, his right to privacy, and his right to procedural due process in connection with his continued employment at the Department warrant only brief discussion.

A.

The Second Amendment provides that [HN44] "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The district court properly dismissed Sergeant Edwards' claim that the Defendants violated the Second Amendment by denying him permission to teach the concealed handgun safety course while he was off-duty and by punishing him for doing so without permission, because the law is settled in our circuit that [HN45] the Second Amendment does not apply to the States. See *Love v. Peppersack, Sr.*, 47 F.3d 120, 123 (4th Cir. 1995) (holding that Second Amendment does not apply to the States, and therefore affirming dismissal of plaintiff's claim against State of Maryland and several Maryland state police officers, alleging that such parties violated her Second Amendment right to "keep and bear" a handgun by denying her [**51] a permit to carry a handgun).

B.

Sergeant Edwards' contention that the district court erroneously dismissed his § 1983 claim alleging a violation of his right to privacy is without merit, because [HN46] there is no general constitutional right to privacy; rather, the "right to privacy" has been limited to matters of reproduction, contraception, abortion, and marriage, and none of these matters is implicated in the present case. See *Condon v. Reno*, 155 F.3d 453, 464 (4th Cir. 1998).

C.

Sergeant Edwards' challenge to the district court's dismissal of his § 1983 procedural due process claim alleging a violation of his right to due process in connection with his continued employment at the Department is likewise without merit. In that claim, Sergeant Edwards alleges the Defendants violated his Fourteenth [*253] Amendment right to procedural due process in connection with his continued employment at the Department by suspending him without pay for two weeks without first affording him an opportunity to be heard. Unfortunately for Sergeant Edwards, his second amended complaint alleges no facts that, even when liberally construed, would allow a reasonable inference that

178 F.3d 231, *, 1999 U.S. App. LEXIS 9088, **;
43 Fed. R. Serv. 3d (Callaghan) 890; 15 BNA IER CAS 333

Sergeant Edwards has a^[**52] property interest in continued employment by the City, an essential element of his procedural due process claim. See *Pittman v. Wilson County*, 839 F.2d 225, 226-27 (4th Cir. 1988). Accordingly, we affirm the district court's dismissal of this claim. n12

-----Footnotes-----

n12 Sergeant Edwards raises two other claims grounded in procedural due process. First, he argues that the district court erroneously dismissed his § 1983 claim alleging a deprivation of his liberty interest in pursuing secondary employment of his own choosing without being afforded procedural due process. Second, Sergeant Edwards argues that the district court erred when it dismissed a similar claim made pursuant to the North Carolina Constitution. We have reviewed these claims and find them to be without merit.

-----End Footnotes-----

XI.

In conclusion, we hold: (1) the district court abused its discretion in denying both of Sergeant Edwards' motions to amend his complaint; (2) the district court correctly dismissed all of Sergeant Edwards' § 1983 claims against the Defendants, ^[**53] except his § 1983 claims alleging a violation of his First Amendment rights to free speech and freedom of association; (3) the district court erred as a matter of law in dismissing Sergeant Edwards' § 1983 claims alleging a violation of his First Amendment rights to free speech and freedom of association; and (4) Chief Hill and City Manager Slozak are not entitled to qualified immunity at this early pleading stage. Accordingly, we: (1) reverse the district court's denial of Sergeant Edwards' two motions to amend his complaint; (2) vacate the district court's dismissal of Sergeant Edwards' § 1983 claims alleging violation of his rights to free speech and freedom of association; (3) vacate the accompanying judgment in favor of the Defendants to the extent it grants judgment in favor of the Defendants on these same two claims; (4) affirm the district court's dismissal of his remaining claims and the accompanying judgment with respect to those claims; and (5) remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

JAMES ELLIOTT v. BOARD OF TRUSTEES OF MONTGOMERY COUNTY COMMUNITY COLLEGE
No. 1002, SEPTEMBER TERM, 1994

COURT OF SPECIAL APPEALS OF MARYLAND

104 Md. App. 93; 655 A.2d 46; 1995 Md. App. LEXIS 56; 10 BNAIER CAS 762

March 6, 1995, Filed

DISPOSITION: [***1] JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee was dismissed by defendant employer after he violated the employer's policies and procedural manual by leaving work early without permission. The employee had been disciplined previously and had received a last chance letter. After exhausting all remedies with his employer, the employee filed suit. The Circuit Court for Montgomery County (Maryland) granted the employer's motion for summary judgment. The employee appealed.

OVERVIEW: The employee received a copy of the manual when he began working for the employer in 1979 and again in 1988. The manual was revised at some time in 1988. The employer claimed the revised manual with a copy of a two-page memorandum was distributed to all employees. The employee argued the manual was not distributed to all eligible employees. The memorandum stated the manual had been restructured to make it easier to use. Nowhere was it mentioned that the manual now contained a disclaimer that changed the nature of the employment relationship from an implied continuing contract unless good cause for termination existed to an at-will contract. On review, the court held that (1) the placement of the disclaimer was not ambiguous, (2) the employee failed to produce any evidence the manual was not distributed to all eligible employees, (3) uniform system wide distribution of the manual was reasonable notification and sufficient to put the employee on notice of the disclaimer, (4) where the memorandum minimized the importance of the disclaimer, the disclaimer was not sufficiently conspicuous, and (5) the employee had been afforded his contractual remedy of a hearing and review.

OUTCOME: The court affirmed the award of summary judgment to the employer.

CORE TERMS: manual, disclaimer, memorandum, handbook, good cause, personnel, summary judgment, employment relationship, employment contract, terminated, matter of law, notification, conspicuous, indefinite, placement, insured, employee handbook, implied contract, permission, effective, fact finder, sub judice, distributed, supervisor, disclaim, proffer, easier, contractual liability, reasonable notice, contractual

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

Contracts Law: Types of Contracts: Employment Contracts

[HN1] In Maryland, an employment contract of indefinite duration is considered employment "at will" which, with few exceptions, may be terminated without cause by either party at any time. In two limited situations an "at will" employee may not be discharged without cause. First, the rule that employment contracts of indefinite duration can be legally terminated at any time is inapplicable where the employee is discharged for exercising constitutionally protected rights. Second, at employee handbook may, in some circumstances, become a unilateral contract. While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN2] There is abundant support for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer.

Contracts Law: Defenses: Ambiguity & Mistake

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN3] Not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant. Not every disclaimer in an employer's employee manual, however, will effectively disclaim contractual liability. In order for a disclaimer to be effective in preventing the formation of an employment contract, the disclaimer must be clear and unequivocal. An ambiguity exists when the language in the provision is, to a reasonably prudent layman, susceptible of more than one meaning.

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN4] It is not necessary that an employee actually read a disclaimer in order for it to be valid.

Contracts Law: Contract Modifications

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN5] An employer is free to modify unilaterally the contractual relationship that it had previously established with its employees as a result of an employee manual.

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN6] In reference to disclaimers in employee handbooks or manuals, reasonable notification, not actual notification, is sufficient to put the employee on notice of the disclaimer. A uniform, system wide distribution of a disclaimer will generally constitute reasonable notice thereof. A disclaimer must be both clear and conspicuous. The purpose of a disclaimer is to point out to such an employee that an important change has occurred.

Contracts Law: Contract Interpretation: Good Faith & Fair Dealing

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN7] If an employer has contracted to do something that requires it to exercise its discretion, then it must exercise that discretion in good faith. Absent evidence of bad faith on the part of an employer, courts should be reluctant to overturn an employer's decision to discharge an employee when the employer has complied with its own procedures for resolving matters such as this. So long as an employer follows its policy stated procedures and acts in good faith in determining what is good cause as to the formulation of its disciplinary measures and then, using the proper procedures, in good faith, applies its standards to the facts presented, there is no actionable wrong.

Contracts Law: Contract Interpretation: Good Faith & Fair Dealing

Labor & Employment Law: Employment Relationships

Contracts Law: Types of Contracts: Employment Contracts

[HN8] Causes of action arising out of employment relationships implied from employee manuals are not actions in which judicial fact finders are free to make determinations as to what constitutes good cause independent of the manuals and the employer's policy. Such causes of action are to determine primarily whether the employer has, in good faith, complied with the practices and procedures created by the manual and made a good faith resolution supported by sufficient evidence. Only in the presence of a failure to comply with stated or implied practice or procedures, insufficient evidence, or bad faith in the resolution of the matter may a judicial fact finder be substituted for the employer.

JUDGES: Moylan, Bishop, Cathell, JJ.

OPINIONBY: Cathell

OPINION: [*97]

[**47] Opinion by Cathell, J.

Filed: March 6, 1995

Appellant, James Elliott, appeals from the judgment of the Circuit Court for Montgomery County (Cave, J., presiding), granting appellee's, the Board of Trustees of Montgomery County Community College's, Motion for Summary Judgment in this breach of employment contract case. Appellant presents the following questions on appeal:

A.

Did Montgomery College's Policies and Procedures Manual create an enforceable employment contract between Montgomery College and its employee, James Elliott[?]

B.

Did Montgomery College clearly and conspicuously disclaim any intent to create an enforceable contract by virtue of the Montgomery College Policies and Procedures Manual[?]

[**48] C.

Did the trial Court err in finding, as a matter of law, that Montgomery College did not breach the contract created by its Employee Handbook[?]

D.

Was the Trial Court precluded by the Maryland Administrative Procedures Act from allowing a jury to determine whether Mr. Elliott was terminated for cause[?]

Appellant was hired by Montgomery County Community College[***2] (the College) in 1979. He was promoted to a supervisory position in 1988. In 1992, a female employee charged appellant with sexual harassment. As a result, appellant was disciplined, an action that included a demotion and a transfer to the College's Germantown campus. A "last chance letter" was issued to appellant, which provided, in pertinent part:

It is very important that you understand that these actions are taken in the context of giving you a last chance to remain employed at Montgomery College. Any violation of . . . College . . . policy . . . and procedures will lead to immediate disciplinary action, up to and including dismissal.

In February of 1993, appellant was charged with violating College policy by leaving work early without permission. The[*98] College's "Policies/Procedures Manual" (P & P Manual) provides that employees are "to report to work on time and stay until the end of the work day" It is undisputed that appellant left his shift up to one hour early on four separate occasions. Appellant claimed that his immediate supervisor, John Day, gave him permission to leave work whenever he had completed his duties, even if this occurred before the end of his shift. [***3] Day claimed that he only gave appellant permission to do this during the "winter term" and the four occasions on which appellant was charged with leaving early took place after the "winter term" was over.

Day's supervisor filed a recommendation with the Director of Human Resources that appellant's employment be terminated. The Director approved the recommendation and notified appellant that he was terminated, effective April 2, 1993. Appellant filed a Notice of Appeal on March 23, 1993. An appeal hearing was thereafter held before Provost O. Robert Brown on the issue of whether cause existed to discharge appellant. Dr. Brown recommended that the dismissal be upheld and that recommendation was upheld by the Chief Administrative Officer of the College.

104 Md. App. 93, *; 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

Appellant's supervisor gave him a copy of the P & P Manual to read when he first started working at the College in 1979. Appellant was issued his own P & P Manual when he was promoted to his supervisory position in 1988. That same year, the College issued a new P & P Manual. It is not clear when appellant's promotion occurred in relation to the distribution of the new manual. A two-page memorandum accompanied the new manual that provided, [***4] in part:

The new manual, while similar in content to the old one, has been restructured to make it easier to use and update as follows

It then listed six numbered paragraphs concerning the use of the manual, a paragraph concerning computer access, and then notes that: [*99]

The primary purpose of changing the format of the manual is to make it easier for you to use it as a reference document.

Conspicuously absent from the memorandum is any acknowledgement that the manual modification also changed the inherent nature of the employment relationship. No attempt was made to indicate that the new manual provided the following disclaimer in its introduction: "[The manual] does not contain all terms and conditions of employment nor constitute an express or implied employment contract."

After exhausting his remedies at the College, appellant filed this suit in the circuit court, alleging breach of an employment contract. Appellee filed a Motion for Summary Judgment, including with the motion an affidavit that provided that the handbook containing the disclaimer had been distributed to all employees eligible to receive it in 1988 and, thereafter, to each employee that had since become[***5] eligible to receive it. In support of his opposition to appellee's Motion for Summary Judgment, appellant provided an affidavit in which he stated that he had never [**49] seen the disclaimer. At the hearing held on the motion, appellant argued that the disclaimer might not have been distributed to all the College's employees that were entitled to receive the P & P Manual. The hearing judge reserved ruling on the motion to allow appellant more time for discovery. After appellant failed to provide any evidence that the manual containing the disclaimer had not been distributed as appellee had claimed, the hearing judge granted appellee's Motion for Summary Judgment.

A. & B.

In *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 338, 517 A.2d 786 (1986), we stated:

[HN1] In Maryland, an employment contract of indefinite duration is considered employment "at will" which, with few exceptions, may be terminated without cause by either party at any time. *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir.1982); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). In two limited situations an[*100] "at will" [***6] employee may not be discharged without cause. First, the rule that employment contracts of indefinite duration can be legally terminated at any time is inapplicable where the employee is discharged for exercising constitutionally protected rights. . . . The second exception [was] adopted by this court in *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md. App. 381, 486 A.2d 798 (1985), cert. denied, 303 Md. 295, 493 A.2d 349 (1985) [Citations omitted.]

The exception to the employment at will doctrine that we adopted in *Staggs v. Blue Cross of Maryland*, 61 Md. App. 381, 486 A.2d 798, cert. denied, 303 Md. 295, 493 A.2d 349 (1985), was that an employee handbook may, in some circumstances, become an unilateral contract. In *Staggs*, we stated:

The question is whether the contracts in dispute here, which are otherwise of indefinite duration, have been so modified by the personnel policy statement as to remove them from the full strictures of the common law rule. . . .

There has been a great deal of litigation in recent years, throughout the country, [***7] over the effect of personnel handbooks and other types of policy statements issued by employers on "at will" employment agreements. Although there has yet to develop any uniform rule and the decisions vary somewhat, depending on the type of provision sought to be enforced and the theory pled by the employee, most of the more recent decisions seem to reflect the view that such unilateral pronouncements by an employer may create legally enforceable expectations on the part of its employees.

104 Md. App. 93, *; 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

Perhaps the best exposition of this view is found in *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880, 892 (1980). The Court there began by confirming the general rule that indefinite hirings are terminable at the will of either party. It noted, however, that,

"While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative [*101] and loyal work force, and the employee the peace of mind associated with job security and the [***8] conviction that he will be treated fairly."

Id., 292 N.W.2d at 892. . . .

From this, the Court concluded that where the employer "had established a company policy to discharge for just cause only, pursuant to certain procedures, had made that policy known to Toussaint, and thereby had committed itself to discharge him only for just cause in compliance with the procedures," a jury could find that "although Toussaint's employment was for an indefinite term . . . the relationship was not terminable at the will of Blue Cross."

61 Md. App. at 388-90 (some citations omitted). We adopted the Michigan court's Toussaint decision as the law in Maryland, finding support for doing so in *Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221 (1976). There, the Court of Appeals stated that an employer's "policy directive with respect to severance pay constituted an offer of a unilateral contract of [*50] which the employees were aware and, by continuing to work for Brunswick, accepted." *Id.* at 475. The Court added that [HN2] "there is abundant support for the proposition that employer policy directives regarding aspects of the employment[***9] relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer." *Id.* at 476. See also *Hrehorovich v. Harbor Hosp. Center, Inc.*, 93 Md. App. 772, 793, 614 A.2d 1021 (1992), cert. denied, 330 Md. 319, 624 A.2d 490 (1993) ("Such personnel policies may give rise to contractual rights if . . . properly expressed and communicated . . . in a fashion that creates a reasonable basis for . . . reliance on the provisions.").

In *Castiglione*, we noted that a disclaimer in an employee handbook may provide an exception to the Staggs rule, stating:

The handbook contained a statement that it "does not constitute an express or implied contract." . . .

. . . .

[*102] . . . We cautioned . . . [in Staggs] that [HN3] "not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant." [61 Md. App.] at 392, 486 A.2d 798. . . .

The disclaimer language in the policy manual quoted in appellee's pleadings does not indicate any intent to limit the discretion of the appellee to discharge only for [***10] cause, as was the case in Staggs. Moreover, other portions of the manual quoted in appellee's memorandum actually served to reserve the rights of appellee "to direct and discipline our workforce . . . and to take whatever action is necessary in our judgment to operate [the Defendant Hospital]." Finally, unlike the situation in Staggs, in this case the appellee expressly negated, in a clear and conspicuous manner, any contract based upon the handbook for a definite term and reserved the right to discharge its employees at any time. The provisions for review, when viewed in the larger context, were but "general policy statements" not amounting to an offer of employment for a definite term or requiring cause for dismissal.

69 Md. App. at 338-40 (some citations omitted).

Not every disclaimer in an employer's employee manual, however, will effectively disclaim contractual liability. In *Haselrig v. Public Storage, Inc.*, 86 Md. App. 116, 128, 585 A.2d 294 (1991), we noted that, in order for a disclaimer to be effective in preventing the formation of an employment contract, the disclaimer must be "clear and unequivocal" In *Haselrig*, the employer[***11] relied on two provisions in the employee handbook in support of its contention that it had effectively disclaimed any contractual liability in excess of that under the employment at will doctrine. One provision, under the heading captioned "Employment Relationship," provided:

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

The relationship between you and PSI is predicated on an at will basis. That is to say that either the Employee or the Company may terminate their employment at their discretion.

[*103] Id. at 120. The second provision was found in a section pertaining to a probationary period and provided:

It should be understood that employment and compensation can be terminated, with or without cause and with or without notice at any time, at the option of either the Company or the Employee.

Id. at 120-21. In deciding that these two provisions were not, as a matter of law, adequate to disclaim the employee handbook as an implied contract, we stated:

If we determine that the language of the provisions is ambiguous -- an ambiguity exists when the language in the provision is, to a reasonably prudent layman, susceptible of more than one meaning, *Truck Insurance Exchange v. Marks Rentals, Inc.*, 288 Md. 428, 433, 418 A.2d 1187 (1980),[***12] or where the placement of the provisions in the handbook has that effect -- and/or equivocal, then the issue of appellant's justification in relying on the other provisions is for the fact finder. Where the issue is, as it is here, the justiciability of an employee's reliance on a handbook, we must consider both the placement of the provisions [**51] in the handbook and the language of the provisions.

86 Md. App. at 128.

The language of the disclaimer in the case sub judice is not ambiguous. Nor does the placement of the disclaimer cause one to question whether it applied to only a portion of the manual; its placement in the new P & P Manual's introduction clearly indicates its application to the manual as a whole. n1 Nevertheless, appellant proffers two reasons why the disclaimer was not, as a matter of law, sufficient. First, he claims that he never received the disclaimer. With respect to this contention, we note that [HN4] it is not necessary that an employee actually read a disclaimer in order for it to be valid.

-----Footnotes-----

n1 We nevertheless perceive that the better practice might well be to have such disclaimer language in bold print, at the very beginning of the introduction or in some other way prominently highlighted within the introduction.

-----End Footnotes-----

[***13] [*104]

We initially note that [HN5] an employer is free to modify unilaterally the contractual relationship that it had previously established with its employees as a result of an employee manual.

In *Castiglione*, 69 Md. App. at 335 n.4, we responded to *Castiglione's* argument that the manual she was first issued did not claim a disclaimer by stating:

Even if the review provisions of the manual in effect at appellant's initial hiring constituted an implied contract, . . . the later manual [which did have a disclaimer] would have superseded any earlier editions. By continuing to work for appellee after the new manual's issuance, appellant, by her conduct, impliedly would have assented to a modification of her employment agreement.[n2]

-----Footnotes-----

n2 While we do not need to resolve the issue here, we note that if an employer has the right to change its policy at any time -- and generally it has that right - then a question exists as to what rights under what policy exist in the event that a new policy conflicts with the old policy and the new policy contains insufficient disclaimer language as to some of the employees. The hearing judge alluded to this when he stated at the hearing, "But there is no former contract if they

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

changed the policy. It says it is the policy in effect at the time he is terminated, and that is exactly what it is, a policy, not a portion of the contract." The potential conflict exists, of course, primarily when an employer unilaterally changes its policy. If the disclaimer language is not sufficiently clear, does the policy revert back to the prior policy that is no longer the employer's policy? Thankfully, we need not now resolve this enigmatic legal question.

-----End Footnotes-----

***14]

The affidavit that appellee included in its Motion for Summary Judgment provided the undisputed fact that the disclaimer was distributed "College-wide in September 1988." The hearing judge provided appellant the opportunity to conduct discovery and submit evidence that this was not true. Appellant failed to submit any such evidence. While no Maryland appellate court has had the opportunity to address the issue of whether each individual employee must actually see the disclaimer, we note the concern the hearing judge expressed over creating such liability, namely, "It does not matter . . . whether he remembers getting it, whether he received it because everyone, then, can come in and say, 'I don't remember seeing it. I never got it.' If it was generally [*105]circulated, then that is what becomes the agreement, and the disclaimer is valid." We agree with Judge Cave on this point.

While other jurisdictions appear to be split over this precise issue, we find the rule adopted by the Michigan courts to be persuasive. In *Grow v. General Products, Inc.*, 184 Mich. App. 379, 457 N.W.2d 167, 170-71 (Mich. App. 1990), appeal denied, 478 N.W.2d 92 (Mich. 1991), the[***15] court affirmed the granting of a summary disposition, stating that "an employer may unilaterally change its employment termination policy so long as reasonable notice is given. Reasonable notification is not necessarily actual notification" In *Transou v. Electronic Data System*, 767 F. Supp. 1392, 1399 (E. D. Mich. 1991), aff'd, 986 F.2d 1422 (1993), the court granted the employer's motion for summary judgment, stating: "Though plaintiff claims that he does not recall receiving a copy of the handbook, its disclaimer is effective in light of the uniform and reasonable method of distributing the manual throughout the company." Cf. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash. 2d 426, 815 P.2d 1362, 1367 (Wash. 1991) (reasonable notice would not include [***52] only giving handbooks with disclaimer to new employees). In the case sub judice, the undisputed evidence indicates that the P & P Manual containing the disclaimer was generally circulated College-wide in 1988. We hold that, [HN6] in reference to disclaimers in employee handbooks or manuals, reasonable notification, not actual notification, is sufficient to put the employee[***16] on notice of the disclaimer. We further hold that a uniform, system wide distribution of a disclaimer will generally constitute reasonable notice thereof.

Appellant also claims that the memorandum that accompanied the new P & P Manual in its dissemination "did nothing to place employees on notice of the dramatic change in their legal rights vis-a-vis their employer" and lulled the employees "into a false sense of security." We agree.

In *Castiglione*, 69 Md. App. 325, 340, 517 A.2d 786, 793, we stated that a disclaimer must be both clear and conspicuous. Had the memorandum in the case at bar not been a part of the general distribution or had the memorandum specifically referenced [*106] the importance of the disclaimer language, we would have no problem deciding that the disclaimer at issue here was clear and conspicuous by reason of its placement in the manual, i.e., its language is clear and it is placed in the introduction.

The purpose of a disclaimer is to point out to such an employee that an important change has occurred. The memorandum at issue here, however, mutes the effectiveness of the disclaimer. The memorandum does, and may have been designed to do, just the opposite of [***17] directing the attention of the employee to, what may well be, the most important change. Because the effect of the memorandum was to minimize the importance of what was, if not the most important provision in the new manual, at least a very important change, we do not believe, considering the totality of the circumstances, that the disclaimer was sufficiently conspicuous in the case sub judice. The memorandum provided that the new manual was "similar in content to the old one" and "the primary purpose of changing the format of the manual is to make it easier to use"

In *Government Employees Ins. v. Ropka*, 74 Md. App. 249, 267, 536 A.2d 1214 (1988), we noted that, with respect to insurance policies, "most jurisdictions impose an affirmative duty on the insurer to make the insured aware of changes inserted into a renewal policy" We noted that the rationale behind this was:

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***, 10 BNA IER CAS 762

When an insured purchases an original policy of insurance he may be expected to read it and the law may fairly impose upon him such restrictions, conditions and limitations as the average insured would ascertain from such reading. However, where the stated period of coverage in the original[***18] policy is about to expire and the insurance company simply sends a renewal policy for the new period of coverage, the insured, in all likelihood, will not read it over again and may not fairly be expected to do so. Absent notification that there have been changes in the restrictions, conditions or limitations of the policy, the insured is justly entitled to [*107] assume that they remain the same and that his coverage has not in anywise been lessened.

Id. at 268 (quoting from *Bauman v. Royal Indemnity Co.*, 36 N.J. 12, 174 A.2d 585, 591-92 (N. J. 1961)).

Essentially, the memorandum in the case sub judice indicated that the changes in the manual were ones of form and not substance. We believe that, because of the memorandum, the College's employees would not have been likely to examine closely the contents of the new manual that was described as roughly the size of a telephone book. See *Swanson v. Liquid Air Corp.*, 118 Wash. 2d 512, 826 P.2d 664 (Wash. 1992) (The court held that a disclaimer placed on page 6 of a 200 page manual was not effective as a matter of law. The court considered it relevant that the manual was accompanied by a cover[***19] letter that failed to mention the disclaimer.) We do not hold that, in order for the employer to disclaim contractual liability as a matter of law, the employer must provide a separate letter, in addition to the manual containing a conspicuously placed and clear disclaimer. Rather, we merely note that, when the employer makes an affirmative statement that the manual is similar to a previous one and is [**53] designed merely to make it easier to use, the circumstances are such that an employee would not be likely to review the manual to ascertain whether important changes to the very nature of his employment relationship have been made. The disclaimer here changed the very nature of the relationship from an implied continuing contract unless good cause for termination exists to an at will contract. Therefore, because of the memorandum that down played the significance of the new P & P Manual, we hold that the disclaimer was not, as a matter of law, conspicuous and, thus, the issue of whether appellant received notice of the disclaimer was a matter to be determined by the finder of fact in the context of a resolution of whether the employment relationship had changed.

C. & D.

Our holding [***20] above does not dispose of this case because the hearing judge found, in the alternative, that, even if an implied [*108] contract existed, i.e., even if the disclaimer was ineffective to change the employment relationship, there was no breach of that prior implied contract because appellant received all that he was entitled to under the employment relationship created by implication from the former policy and pre-modified manual.

Appellant was discharged for leaving his shift early without his supervisor's permission. Appellant contends, however, that he, in fact, had his supervisor's permission. Appellee cites *H & R Block, Inc. v. Garland*, 278 Md. 91, 99-100, 359 A.2d 130 (1976), and *MacGill v. Blue Cross*, 77 Md. App. 613, 619-20, 551 A.2d 501, cert. denied, 315 Md. 692, 556 A.2d 673 (1989), apparently for the proposition that, once the College determined that it had "cause" to discharge appellant, the courts could not disturb this finding, absent some evidence of bad faith on the part of the College.

The above cited cases stand for the proposition that, [HN7] if an employer has contracted to do something that requires it to exercise its discretion, then [***21] it must exercise that discretion in good faith. In *Garland*, the issue was whether H & R Block had found Garland's performance "satisfactory." The Court held that, since there was no evidence that H & R Block had not acted in good faith, its motion for a directed verdict should have been granted. In *MacGill*, the issue MacGill attempted to raise on appeal was whether he was the "most qualified" so as to have been entitled to the promotion for which he applied. We noted, in response to MacGill's contention:

Were such allegations accepted as sufficient, the courts would necessarily become involved in the assessment of the propriety and soundness of a company's personnel decisions; the courts would be required to act as super personnel officers, overseeing and second-guessing the company's decisions whenever an unsuccessful applicant perceives him -- or herself to have been the most qualified applicant.

MacGill, 77 Md. App. at 620 n.3.

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

We glean from *Garland and MacGill* that, absent evidence of bad faith on the part of an employer, courts should [*109] be reluctant to overturn an employer's decision to discharge an employee when the employer has complied with its own[***22] procedures for resolving matters such as this.

We have exhaustively examined the exhibits contained in the extract, including the complaint, motions, responses, and affidavits. We have found absolutely no allegations below by appellant of "bad faith" on the part of the employer. There is nowhere contained in the affidavits in opposition to the appellee's motion any proffer of any evidential matter that would even pertain to any assertion of "bad faith." The complaint failed to assert bad faith in the first instance. So long as an employer follows its policy stated procedures and acts in good faith in determining what is good cause as to the formulation of its disciplinary measures and then, using the proper procedures, in good faith, applies its standards to the facts presented, there is no actionable wrong.

The potential issue for a jury is not what constitutes good cause. A jury cannot establish a good cause for separation separate and apart from the agreement of the parties -- or, in this case, the unilateral policy [**54] of the employer. It is for the parties, or, as in this case, for the employer, through policy statements, to establish what is good cause and the procedures to be [***23] followed in determining whether good cause (and not some other cause, or lack thereof, perceived to be appropriate or inappropriate by a fact finder independent of the employer's policy) exists. The Court of Appeals opined in *Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 307, 596 A.2d 1069 (1991):

By creating and disseminating its grievance procedures, Suburban promised merely that they would be followed. . . .

. . . In the case before us the hospital lived up to its obligations to Dwiggins by acting in accordance with every step in its grievance system. Having done that, Suburban owed Dwiggins nothing more.

[*110] Quoting from *Meleen v. Hazelden Foundation*, 740 F. Supp. 687 (D. Minn. 1990), *aff'd*, 928 F.2d 795 (8th Cir. 1991), the Court continued:

". . . But, this was a private contract; no right to constitutional due process or proof beyond a reasonable doubt existed. Plaintiff's private expectations and due process concepts are not part of the employment contract."

324 Md. at 308. The Court then held:

An employer may limit his right to terminate a worker by establishing virtually any disciplinary procedure. But courts[***24] must not read more into the procedure than is there. Unless some public policy is implicated, employee grievance mechanisms should be analyzed only for what they offer; they must not be seen automatically as quasi-judicial forums for final and impartial dispute resolution governed by standards of due process and neutral fairness.

324 Md. at 310.

The determination as to whether liability attaches depends upon whether the employer has followed its stated procedures and, where its manual-generated policy requires the employer to act in good faith, has acted in good faith in determining good cause. If it has satisfied those two criteria, no action will lie. Even when there is conflicting evidence, so long as the employer acts in good faith pursuant to its proper procedures, the fact that a different inference from the evidence might be made does not create an issue to be submitted to a judicial fact finder. Only in instances when the employer's policy promises a good faith application, if there are allegations of bad faith in the resolution of the conflicting evidence, or evidence, or evidentiary proffers properly made of such bad faith, would such an issue result in a triable action. To[***25] hold otherwise would be to put the courts in the position of making, as we said in *MacGill*, "personnel decisions," acting as a "super personnel officer," or of "second-guessing a company's decisions," even when the company follows its procedures and does so in good faith. The hearing court appeared to recognize this initially, as it opined: [*111]

The Court is further of the opinion that even if [appellant's] employment for an indefinite period had [not] been modified by the personnel policy statement, unlike the situation in *Staggs*, [appellant] was afforded his contractual remedy of a hearing and review. [Appellee], *Montgomery College*, therefore complied with the provisions of the policy and procedure statement.

104 Md. App. 93, *, 655 A.2d 46, **;
1995 Md. App. LEXIS 56, ***; 10 BNA IER CAS 762

The hearing court, however, apparently referring back to the hearing where it discussed its beliefs that "in any other case [where] they have provided . . . an administrative procedure" and "any other agency . . . the matter would be . . . an administrative appeal," added in its opinion:

Whatever mistaken beliefs [appellant] may have had, that he did not have to work the full shift, the decision of the Director of Human Resources and the Chief Administrative Officer should be [***26] treated in the nature of an Administrative Appeal. If there were any facts to support the decision made on behalf of [appellee], this Court should not substitute its opinion for that of the representative of the [appellee]. [Emphasis added.]

Appellant contends that the hearing court erroneously invoked the Administrative Procedure Act in holding the court [**55] should not substitute its judgment for that of appellee's representative, if there were any facts in the record to support the decision. Despite the fact that the hearing judge's choice of language refers to administrative procedures not normally applicable to civil contract causes of action, as we perceive its use in the context of the opinion, he was primarily commenting on the lack of any assertion as to "bad faith" on the part of the appellee. The hearing judge's comments as to the affording of appellant's procedural rights by appellee was indicative of the fulfillment of the specific contractual obligation. We disagree with the proposition that the hearing judge applied the Administrative Procedure Act's standards in this case. Rather, the hearing judge simply indicated that, if there were a contract, appellant received that [***27] to which he would have been entitled -- namely, the right to invoke the procedure set forth in the manual and the right to require appellee to exercise good faith [*112] in following that procedure. See *Hicks v. Methodist Medical Center*, 229 Ill. App. 3d 610, 593 N.E.2d 119, 170 Ill. Dec. 577 (Ill. App. 3d Dist. 1992) (disclaimer was not effective but there was no breach of contract because the employer had followed the grievance procedure). As there was absolutely no evidence, or proffer, of bad faith on the part of the employer and it was uncontradicted that the employer followed its own stated procedures and it was uncontradicted that there was some evidence supporting a termination for cause, the hearing court did not err in its ruling on the motion.

[HN8] Causes of action arising out of employment relationships implied from employee manuals are not actions in which judicial fact finders are free to make determinations as to what constitutes good cause independent of the manuals and the employer's policy. As we have said, such causes of action are to determine primarily whether the employer has, in good faith, complied with the practices and procedures created by the manual and made a good faith resolution[***28] supported by sufficient evidence. Only in the presence of a failure to comply with stated or implied practice or procedures, insufficient evidence, or bad faith in the resolution of the matter may a judicial fact finder be substituted for the employer.

Appellee claimed for the first time on appeal that this suit was barred under the doctrine of sovereign immunity. Because we hold the hearing court did not err in granting appellee's Motion for Summary Judgment, we do not find it necessary to resolve this issue.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FLAGG BROS., INC., ET AL. v. BROOKS ET AL.
No. 77-25

SUPREME COURT OF THE UNITED STATES

436 U.S. 149; 98 S. Ct. 1729; 56 L. Ed. 2d 185; 1978 U.S.LEXIS 90; 23 U.C.C. Rep. Serv. (Callaghan) 1105

January 18, 1978, Argued
May 15, 1978, Decided *

* Together with No. 77-37, Lefkowitz, Attorney General of New York v. Brooks et al.; and No. 77-42, American Warehousemen's Assn. et al. v. Brooks et al., also on certiorari to the same court.

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DISPOSITION: 553 F.2d 764, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant warehouse sought review of a decision of the United States Court of Appeals for the Second Circuit, which found sufficient state involvement with the proposed sale of plaintiff's possessions to invoke the provisions of the Due Process Clause of the Fourteenth Amendment.

OVERVIEW: Plaintiff was evicted from her apartment and her possessions were stored by defendant in its warehouse. After a series of disputes over the validity of charges claimed by defendant, plaintiff received a letter demanding that her account be brought up to date or her furniture would be sold pursuant to the state commercial code. Plaintiff then filed suit against defendant, seeking an injunction against the threatened sale of her belongings and the declaration that such a sale would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. An order dismissing the complaint for failure to state a claim was reversed by the court of appeals. The Supreme Court reversed, holding that plaintiff failed to allege facts that constituted a deprivation of any right secured by the Constitution and laws of the United States. The state did not compel the sale of plaintiff's possessions, but merely announced the circumstances under which its courts would not interfere with a private sale. Thus, the allegations of plaintiff's complaint did not establish a violation of her Fourteenth Amendment rights either by defendant or the state.

OUTCOME: The decision finding sufficient state involvement with the proposed sale of plaintiff's possessions to invoke the provisions of the Due Process Clause of the Fourteenth Amendment was reversed. The threatened sale of plaintiff's possessions, pursuant to state commercial code, did not establish a violation of plaintiff's Fourteenth Amendment rights either by defendant warehouse or the state.

CORE TERMS: warehouseman, state action, Fourteenth Amendment, deprivation, storage, sovereign, delegated, proposed sale, election, state statute, involvement, private party, stored, park, state power, state law, reserved, property interest, authorization, state-action, notification, exclusivity, authorize, challenged statute, public function, ministerial, self-help, belongings, deprived, enacting

LexisNexis (TM) HEADNOTES - Core Concepts:

436 U.S. 149, *, 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

Commercial Law (UCC): Warehouse Receipts, Bills of Lading & Other Documents of Title (Article 7): General Obligations

[HN1] See N.Y. U.C.C. Law § 7-210.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN2] A claim upon which relief may be granted to a plaintiff under 42 U.S.C.S. § 1983 must embody at least two elements. The plaintiff is first bound to show that he has been deprived of a right secured by the Constitution and the laws of the United States. He must secondly show that the defendant deprived him of this right acting under color of any statute. It is clear that these two elements denote two separate areas of inquiry.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN3] Whatever else may be necessary to show that a person has acted under color of statute for purposes of 42 U.S.C.S. § 1983, it is essential that he act with the knowledge of and pursuant to that statute.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN4] Some rights established either by the United States Constitution or by federal law are protected from both governmental and private deprivation. Although a private person may cause a deprivation of such a right, he may be subjected to liability under 42 U.S.C.S. § 1983 only when he does so under color of law. However, most rights secured by the United States Constitution are protected only against infringement by governments.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN5] The dictates of the Due Process Clause attach only to the deprivation of an interest encompassed within U.S. Const. amend. XIV protection.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN6] While as a factual matter, any person with sufficient physical power may deprive a person of his property, only a state or a private person, whose action may be fairly treated as that of the state itself, may deprive him of an interest encompassed within U.S. Const. amend. XIV protection.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN7] The settlement of disputes between debtors and creditors is not traditionally an exclusive public function.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN8] A state is responsible for the act of a private party when the state, by its laws, has compelled the act. A state's mere acquiescence in a private action does not convert that action into that of the state.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN9] A state may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of U.S. Const. amend. XIV extend to all actions of the state that infringe on rights protected thereby.

SUMMARY: A provision of the New York Uniform Commercial Code (7-210) governing the enforcement of a warehouseman's lien authorizes a warehouseman to sell goods entrusted to him for storage when storage charges are not paid. An evicted tenant whose belongings had been placed in a storage company's warehouse, upon being faced with the possibility that her belongings would be sold for nonpayment of storage charges, brought a class action against the storage company in the United States District Court for the Southern District of New York under 42 USCS 1983, which authorizes a civil action for deprivation, by a person acting under the color of a state statute, of a right "secured by the Constitution." Subsequently, another tenant joined as a plaintiff in the action, which sought damages, an injunction, and a declaration that a sale pursuant to the New York UCC provision would violate the due process and equal protection clauses of the Fourteenth Amendment. After certain parties were permitted to intervene as defendants, the District Court dismissed the complaint for failure to state a claim for relief under 1983 (404 F Supp 1059). The United States Court of Appeals for the Second Circuit reversed (553 F2d 764).

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, J., joined by Burger, Ch., J., and Stewart, Blackmun, and Powell, JJ., it was held that a warehouseman's sale under the UCC provision did not constitute "state action" for purposes of the claim that such sale violated the Fourteenth Amendment--the tenants thus having failed

436 U.S. 149, *, 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

to state a claim for relief under 1983--since the UCC provision did not delegate to warehousemen an exclusive prerogative of the sovereign, and the sale under the provision could not be attributed to the state on the ground that the state authorized and encouraged such sales by enacting the provision.

Marshall, J., dissenting, expressed the view that the state action doctrine required the court to decide the issue presented with careful attention to the state's traditional role in lien execution by forced sale.

Stevens, J., joined by White and Marshall, JJ., dissented on the ground that state action was present because New York had authorized the warehouseman to perform what was clearly a state function.

Brennan, J., did not participate.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

enforcement of warehouseman's lien -- state action -- Fourteenth Amendment --

Headnote:

A warehouseman's sale of individuals' stored goods for their nonpayment of storage charges, which sale is authorized by a state's law governing the enforcement of a warehouseman's lien (Uniform Commercial Code 7-210), does not constitute "state action" for purposes of the individuals' claim that the sale violates the Fourteenth Amendment's due process and equal protection clauses--the individuals thus failing to state a claim for relief under 42 USCS 1983, which authorizes a civil action for deprivation, by a person acting under the color of a state statute, of a right "secured by the Constitution"--since the law does not delegate to a warehouseman an exclusive prerogative of the sovereign, and a warehouseman's sale under the law cannot be attributed to the state on the ground that the state authorized and encouraged such sales by enacting acting the law. (Stevens, White, and Marshall, JJ., dissented from this holding.)

[***HN2]

complaint -- truth of allegations --

Headnote:

On certiorari to review a decision of a Federal Court of Appeals reversing a Federal District Court's dismissal of a plaintiff's cause of action for failure to state a claim upon which relief could be granted under 42 USCS 1983, the United States Supreme Court must accept the allegations of the plaintiff's complaint as true.

[***HN3]

mootness -- enforcement of warehouseman's lien -- auctioneer's fee -- damages --

Headnote:

An action which had been brought in a Federal District Court under 42 USCS 1983 for damages, an injunction against the threatened sales of the plaintiffs' belongings, and a declaration that such sales, pursuant to a state law governing the enforcement of a warehouseman's lien, would violate due process and equal protection under the Fourteenth Amendment, is not moot at the time of the United States Supreme Court's review of a decision of a Federal Court of Appeals which reversed the District Court's dismissal of the complaint for failure to state a claim under 1983, since (1) notwithstanding that injunctive relief against sale of the plaintiffs' belongings was no longer available, the Supreme Court would be required to reach the merits of the claim if either plaintiff could demonstrate suffering monetary damage by reason of the workings of the challenged state law, and (2) one of the plaintiffs--who had died prior to the Court of Appeals' decision, but whose claim the Court of Appeals had concluded survived under 1983 for the benefit of such plaintiff's estate--alleged in an affidavit submitted with the complaint that such plaintiff had paid an auctioneer's fee which the warehouseman had charged pursuant to a provision of the challenged law, and such plaintiff would be entitled

436 U.S. 149, *, 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

to recover that fee if correct in the contention that the warehouseman's invocation of the challenged law constituted a violation by the state itself of the Fourteenth Amendment.

[***HN4]

deprivation -- elements of civil action --

Headnote:

A claim upon which relief may be granted to plaintiffs suing a defendant under 42 USCS 1983, which provides a civil action for the deprivation of civil rights, must embody at least two elements: (1) the plaintiffs are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States, and (2) they must secondly show that the defendant deprived them of this right acting "under color of any statute" of the state; such two elements denote two separate areas of inquiry.

[***HN5]

acts "under color of [a] statute" --

Headnote:

Whatever else may be necessary to show that a person has acted "under color of a [a] statute" for purposes of 42 USCS 1983, which provides a civil action for the deprivation of civil rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," it is essential that the person act with knowledge of and pursuant to that statute.

[***HN6]

deprivation -- private person -- action under color of law --

Headnote:

For purposes of 42 USCS 1983, authorizing a civil action against any person depriving others of rights secured by the Constitution and laws of the United States, although a private person may cause a deprivation of such a right, he may be subjected to liability under 1983 only when he does so under color of law.

[***HN7]

deprivation -- Fourteenth Amendment -- private person -- requirements for civil action --

Headnote:

In an action brought under 42 USCS 1983, which provides a civil action for the deprivation of civil rights, against a private person, who had acted in regard to the plaintiffs' possessions pursuant to a state's law governing the enforcement of a warehouseman's lien, to recover for the defendant's alleged deprivation of the plaintiffs' right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law, the plaintiffs must establish not only that the defendant acted under color of the statute, but also that the actions of the defendant are properly attributable to the state whose law was involved.

[***HN8]

Fourteenth Amendment -- state action --

Headnote:

The involvement of a state official may provide the state action essential to show a direct violation of a petitioner's Fourteenth Amendment rights, whether or not the official's actions were officially authorized, or lawful.

[***HN9]

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

Fourteenth Amendment -- due process -- state action --

Headnote:

While as a factual matter any person with sufficient physical power may deprive a person of his property, only a state, or a private person whose action may fairly be treated as that of the state itself, may deprive him of an interest encompassed within the Fourteenth Amendment's protection.

SYLLABUS: After respondent Brooks and her family had been evicted from their apartment and their belongings had been stored by petitioner storage company, Brooks was threatened with sale of her belongings pursuant to New York Uniform Commercial Code § 7-210 unless she paid her storage account. She thereupon brought this class action under 42 U. S. C. § 1983, seeking damages and injunctive relief and a declaration that the sale pursuant to § 7-210 (which provides a procedure whereby a warehouseman conforming to the provisions of the statute may convert his lien into good title) would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Subsequent interventions by respondent Jones as plaintiff and petitioners warehouse associations and the New York State Attorney General as defendants were permitted. The District Court dismissed the complaint for failure to state a claim for relief under § 1983, which provides, inter alia, that every person who under color of any state statute subjects any citizen to the deprivation of any rights secured by the Constitution and federal laws shall be liable to the injured party. The Court of Appeals reversed, holding that state action might be found in the exercise by a private party of "some power delegated to it by the State which is traditionally associated with sovereignty," and that "by enacting § 7-210 New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution . . . but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." Held: A warehouseman's proposed sale of goods entrusted to him for storage, as permitted by § 7-210, is not "state action," and since the allegations of the complaint failed to establish that any violation of respondents' Fourteenth Amendment rights was committed by either the storage company or the State of New York, the District Court properly concluded that no claim for relief was stated by respondents under 42 U. S. C. § 1983. Pp. 155-166.

(a) Respondents' failure to allege the participation of any public officials in the proposed sale plainly distinguishes this litigation from decisions such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601; *Fuentes v. Shevin*, 407 U.S. 67; and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, which imposed procedural restrictions on creditors' remedies. P. 157.

(b) The challenged statute does not delegate to the storage company an exclusive prerogative of the sovereign. Other remedies for the settlement of disputes between debtors and creditors (which is not traditionally a public function) remain available to the parties. *Terry v. Adams*, 345 U.S. 461; *Smith v. Allwright*, 321 U.S. 649; *Nixon v. Condon*, 286 U.S. 73; and *Marsh v. Alabama*, 326 U.S. 501, distinguished. Pp. 157-163.

(c) Though respondents contend that the State authorized and encouraged the storage company's action by enacting § 7-210, a State's mere acquiescence in a private action does not convert such action into that of the State. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163. Pp. 164-166.

COUNSEL: Alvin Altman argued the cause and filed briefs for petitioners in No. 77-25. A. Seth Greenwald, Assistant Attorney General of New York, argued the cause for petitioner in No. 77-37. With him on the briefs were Louis J. Lefkowitz, Attorney General, pro se, and Samuel A. Hirshowitz, First Assistant Attorney General. William H. Towle filed a brief for petitioners in No. 77-42. Arnold H. Shaw filed a brief for the Warehousemen's Association of New York and New Jersey, Inc., et al., respondents under this Court's Rule 21 (4), in support of petitioners.

Martin A. Schwartz argued the cause for respondents Brooks et al. in all cases. With him on the brief was Lawrence S. Kahn. +

+ Briefs of amici curiae urging affirmance were filed by W. Bernard Richland and L. Kevin Sheridan for the city of New York; by John E. Kirklin and Kalman Finkel for the Legal Aid Society of New York City; by John C. Esposito for the New York State Consumer Protection Board; and by Robert S. Catz for the Urban Law Institute in No. 77-42.

436 U.S. 149, *, 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J. , and STEWART, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, post, p. 166. STEVENS, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, post, p. 168. BRENNAN, J., took no part in the consideration or decision of the cases.

OPINIONBY: REHNQUIST

OPINION: [*151] [***190] [**1731] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[***HR1A] The question presented by this litigation is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7-210 (McKinney 1964), n1 is an action properly [***191] attributable [*152] to the State of New York. The District Court found that the warehouseman's conduct was not that of the State, and dismissed this suit for want of jurisdiction under 28 U. S. C. [*153] § 1343 (3). 404 F.Supp. 1059 (SDNY 1975). The Court of Appeals for the Second Circuit, in reversing the judgment of the District Court, found sufficient state involvement [**1732] with the proposed sale to invoke the provisions of the Due Process Clause of the Fourteenth Amendment. 553 F.2d 764 (1977). We agree with the District Court, and we therefore reverse.

-----Footnotes-----

n1 The challenged statute reads in full:

"§ [HN1] 7 -- 210. Enforcement of Warehouseman's Lien

"(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

"(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

"(a) All persons known to claim an interest in the goods must be notified.

"(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

"(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

"(d) The sale must conform to the terms of the notification.

"(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

"(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

"(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

"(4) The warehouseman may buy at any public sale pursuant to this section.

"(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

"(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

"(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

"(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

"(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

-----End Footnotes-----

I

***HR2] According to her complaint, the allegations of which we must accept as true, respondent Shirley Brooks and her family were evicted from their apartment in Mount Vernon, N. Y., on June 13, 1973. The city marshal arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse. Brooks was informed of the cost of moving and storage, and she instructed the workmen to proceed, although she found the price too high. On August 25, 1973, after a series of disputes over the validity of the charges being claimed by petitioner Flagg Brothers, Brooks received a letter demanding that her account be brought up to date within 10 days "or your furniture will be sold." App. 13a. A series of subsequent letters from respondent and her attorneys produced no satisfaction.

***HR3A] Brooks thereupon initiated this class action in the District Court under 42 U. S. C. § 1983, seeking damages, an injunction against the threatened ***192] sale of her belongings, and the declaration that such a sale pursuant to § 7-210 would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. She was later joined in her action by Gloria Jones, another resident of Mount Vernon whose goods had been stored by Flagg Brothers following her eviction. [*154] The American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., moved to intervene as defendants, as did the Attorney General of New York and others seeking to defend the constitutionality of the challenged statute. n2 On July 7, 1975, the District Court, relying primarily on our decision in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), dismissed the complaint for failure to state a claim for relief under § 1983.

***HR3B]

-----Footnotes-----

436 U.S. 149, *, 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

n2 In his order granting the motions to intervene, Judge Gurfein noted that respondent Brooks' goods had been returned to her, but he found that her action had been saved from mootness by her claim for damages. 63 F.R.D. 409, 412 (SDNY 1974). We have no occasion to consider the correctness of that decision, since we have concluded, n. 3, *infra*, that the claim of respondent Jones remains alive.

-----End Footnotes-----

[***HR3C] A divided panel of the Court of Appeals reversed. n3 The majority noted that Jackson had suggested that state action might be found in the exercise by a private party of "some [*155] power delegated to it by the State which is traditionally associated with sovereignty." 553 F.2d, at 770, quoting 419 U.S., at 353. The majority found:

"[By] enacting § 7-210, New York not only delegated to the warehouseman a [**1733]portion of its sovereign monopoly power over binding conflict resolution [citations omitted], but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." 553 F.2d, at 771.

The court, although recognizing that the Court of Appeals for the Ninth Circuit had reached a contrary conclusion in dealing with an identical California statute in *Melara v. Kennedy*, 541 F.2d 802 (1976), concluded that this delegation of power constituted sufficient state action to support federal jurisdiction under 28 U. S. C. § 1343 (3). The dissenting judge found the reasoning of *Melara* persuasive.

[***HR3D]

-----Footnotes-----

n3 Jones died prior to the court's decision. However, the court concluded that, under 42 U. S. C. § 1983, her claim survived for the benefit of her estate, since a comparable claim would survive under applicable New York law. 553 F.2d, at 768 n. 7. For simplicity, Jones will be referred to as a respondent herein.

The court also noted that Jones had recovered most of her possessions after the District Court's dismissal of her action. Unlike Brooks, she paid the charges demanded by Flagg Brothers, but did so "only because of alleged threats of sale and the twenty-month detention of the goods." *Ibid*.

At this point in the litigation, it is clear that Flagg Brothers has not sold and will not sell the belongings of either respondent. Although injunctive relief against such sale is therefore no longer available, we must reach the merits of the claim if either respondent can demonstrate that she has suffered monetary damage by reason of the workings of § 7-210. See, e. g., *Liner v. Jafco, Inc.*, 375 U.S. 301, 305-306 (1964). The affidavit submitted with Jones' complaint alleges that Flagg Brothers charged her an auctioneer's fee, pursuant to § 7-210 (3), which she has now paid. If she is correct that the warehouseman's invocation of the statute constitutes a violation by the State itself of the Fourteenth Amendment, she would surely be entitled to recover that fee. We express no opinion as to whether she could prove other damages causally related to the threatened use of the sale provisions.

-----End Footnotes-----

We granted certiorari, 434 U.S. 817, [***193] to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia, and to address the important question it presents concerning the meaning of "state action" as that term is associated with the Fourteenth Amendment. n4

-----Footnotes-----

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

n4 Even if there is "state action," the ultimate inquiry in a Fourteenth Amendment case is, of course, whether that action constitutes a denial or deprivation by the State of rights that the Amendment protects.

-----End Footnotes-----

II

***HR1B] ***HR4] [HN2] A claim upon which relief may be granted to respondents against Flagg Brothers under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that Flagg Brothers deprived them of this right acting "under color of any statute" of the State of New York. It is clear that these two elements denote two separate areas of [*156] inquiry. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

***HR5] Respondents allege in their complaints that "the threatened sale of the goods pursuant to New York Uniform Commercial Code § 7-210" is an action under color of state law. App. 14a, 47a. We have previously noted, with respect to a private individual, that [HN3] "[whatever] else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." *Adickes*, supra, at 162 n. 23. Certainly, the complaints can be fairly read to allege such knowledge on the part of Flagg Brothers. However, we need not determine whether any further showing is necessary, since it is apparent that neither respondent has alleged facts which constitute a deprivation of any right "secured by the Constitution and laws" of the United States.

***HR6] ***HR7] A moment's reflection will clarify the essential distinction between the two elements of a § 1983 action. [HN4] Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. See, e. g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-424 (1968) (discussing 42 U. S. C. § 1982). Although a private person may cause a deprivation of such a right, he may be subjected to liability under § 1983 only when he does so under color of law. Cf. 392 U.S., at 424-425, and n. 33. However, most rights secured by the Constitution are protected only against infringement by governments. See, e. g., *Jackson*, 419 U.S., at 349; *Civil Rights Cases*, 109 U.S. 3, 17-18 (1883). Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York.

[*157] ***194]

***HR8A] ***HR9] It must be noted that respondents have named no public officials as defendants in [*1734] this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties. n5 This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In those cases, the Court was careful to point out that [HN5] the dictates of the Due Process Clause "[attach] only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." *Fuentes*, supra, at 84. [HN6] While as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action "may be fairly treated as that of the State itself," *Jackson*, supra, at 351, may deprive him of "an interest encompassed within the Fourteenth Amendment's protection," *Fuentes*, supra, at 84. Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not.

***HR8B]

-----Footnotes-----

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

n5 Of course, where the defendant is a public official, the two elements of a § 1983 action merge. "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized, or lawful." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (citations omitted).

-----End Footnotes-----

III

***HR1C] Respondents' primary contention is that New York has delegated to Flagg Brothers a power "traditionally exclusively reserved to the State." *Jackson*, supra, at 352. They argue that the resolution of private disputes is a traditional function of civil government, and that the State in § 7-210 has delegated this function to Flagg Brothers. Respondents, [*158] however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."

One such area has been elections. While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function. This principle was established by a series of cases challenging the exclusion of blacks from participation in primary elections in Texas. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). Although the rationale of these cases may be subject to some dispute, n6 their scope is carefully defined. The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated ***195] elections or elections conducted by organizations which in practice produce "the uncontested choice of public officials." *Terry*, supra, at 484 (Clark, J., concurring). As Mr. Justice Black described the situation in *Terry*, supra, at 469: "The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded." n7

-----Footnotes-----

n6 Indeed, the majority in *Terry* produced three separate opinions, none of which commanded a majority of the Court.

n7 In construing the public-function doctrine in the election context, the Court has given special consideration to the fact that Congress, in 42 U. S. C. § 1971 (a)(1), has made special provision to protect equal access to the ballot. *Terry*, 345 U.S., at 468 (opinion of Black, J.); *Smith*, 321 U.S., at 651. No such congressional pronouncement speaks to the ordinary commercial transaction presented here.

-----End Footnotes-----

***1735] A second line of cases under the public-function doctrine originated with *Marsh v. Alabama*, 326 U.S. 501 (1946). Just as the Texas Democratic Party in *Smith* and the Jaybird Democratic Association in *Terry* effectively performed the entire public function of selecting public officials, so too the [*159] Gulf Shipbuilding Corp. performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned. Under those circumstances, the Court concluded it was bound to recognize the right of a group of Jehovah's Witnesses to distribute religious literature on its streets. The Court expanded this municipal-function theory in *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), to encompass the activities of a private shopping center. It did so over the vigorous dissent of Mr. Justice Black, the author of *Marsh*. As he described the basis of the *Marsh* decision:

"The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on all the attributes of a town, i. e., 'residential buildings, streets, a system

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U.S., at 502." 391 U.S., at 332 (dissenting opinion).

This Court ultimately adopted Mr. Justice Black's interpretation of the limited reach of Marsh in *Hudgens v. NLRB*, 424 U.S. 507 (1976), in which it announced the overruling of *Logan Valley*.

These two branches of the public-function doctrine have in common the feature of exclusivity. n8 Although [***196] the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the [*160] Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute. Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. See N. Y. Civ. Prac. Law § 7101 et seq. (McKinney 1963). The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. N. Y. U. C. C. § 7-210 (9) (McKinney 1964). This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, n9 can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign. n10

-----Footnotes-----

n8 Respondents also contend that *Evans v. Newton*, 382 U.S. 296 (1966), establishes that the operation of a park for recreational purposes is an exclusively public function. We doubt that Newton intended to establish any such broad doctrine in the teeth of the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes. We think Newton rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed "no change in the municipal maintenance and concern over this facility," id., at 301, after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park.

n9 Unlike the parade of horrors suggested by our Brother STEVENS in dissent, post, at 170, this case does not involve state authorization of private breach of the peace.

n10 It is undoubtedly true, as our Brother STEVENS says in dissent, post, at 169, that "respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law. It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.

This situation is clearly distinguishable from cases such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969). In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

garnishee not to pay over money which previously had been the property of the debtor. See *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The "consent" inquiry in *Fuentes* occurred only after the Court had concluded that state action for purposes of the Fourteenth Amendment was supplied by the participation in the seizure on the part of the sheriff. The consent inquiry was directed to whether there had been a waiver of the constitutional right to due process which had been triggered by state deprivation of property. But our Brother STEVENS puts the cart before the horse; he concludes that the respondents' lack of consent to the deprivations triggers affirmative constitutional protections which the State is bound to provide. Thus what was a mere coda to the constitutional analysis in *Fuentes* becomes the major theme of the dissent.

-----End Footnotes-----

[*161] [**1736] Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that [HN7] the settlement of disputes between debtors and creditors [***197] is not traditionally an exclusive public function. n11 Cf. *United States v. Kras*, 409 [*162] U.S. 434, 445-446 (1973). Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh*. n12 This is true whether [**1737] these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a [*163] particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another. Compare *Cox Bakeries v. Timm Moving & Storage*, 554 F.2d 356, 358-359 (CA8 1977), with *Melara*, 541 F.2d, at 805-806, and n. 7. Cf. *Bell v. Maryland*, 378 U.S. 226, 334-335 (1964) (Black, J., dissenting). n13

-----Footnotes-----

n11 It may well be, as my Brother STEVENS' dissent contends, that "[the] power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system." *Post*, at 178-179. But here New York, unlike Florida in *Fuentes*, Georgia in *North Georgia Finishing*, and Wisconsin in *Sniadach*, has not ordered respondents to surrender any property whatever. It has merely enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title. There is no reason whatever to believe that either *Flagg Brothers* or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the "surrenders of property" to which that dissent refers, and that the compliance of *Flagg Brothers* with applicable New York property law would be reviewed after customary notice and hearing in such a proceeding.

The fact that such a judicial review of a self-help remedy is seldom encountered bears witness to the important part that such remedies have played in our system of property rights. This is particularly true of the warehouseman's lien, which is the source of this provision in the Uniform Commercial Code which is the law in 49 States and the District of Columbia. The lien in this case, particularly because it is burdened by procedural constraints and provides for a compensatory remedy and judicial relief against abuse, is not atypical of creditors' liens historically, whether created by statute or legislatively enacted. The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State. Cf. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

n12 This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints. We merely address the public-function doctrine as respondents would apply it to this case.

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York's statute has done nothing more than authorize (and indeed limit) -- without participation by any public official -- what Flagg Brothers would tend to do, even in the absence of such authorization, i. e., dispose of respondents' property in order to free up its valuable storage space. The proposed sale pursuant to the lien in this case is not a significant departure from traditional private arrangements.

n13 See also *Davis v. Richmond*, 512 F.2d 201, 203 (CA1 1975):

"[We] are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England."

-----End Footnotes-----

Thus, even if we were inclined to extend the sovereign-function doctrine outside of its present carefully [***198] confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. We conclude that our sovereign-function cases do not support a finding of state action here.

Our holding today impairs in no way the precedential value of such cases as *Norwood v. Harrison*, 413 U.S. 455 (1973), or *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which arose in the context of state and municipal programs which benefited private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems. And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. n14 We express no view as to the extent, [*164] if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.

-----Footnotes-----

n14 Contrary to MR. JUSTICE STEVENS' suggestion, post, at 172 n. 8, this Court has never considered the private exercise of traditional police functions. In *Griffin v. Maryland*, 378 U.S. 130 (1964), the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he "purported to exercise the authority of a deputy sheriff." *Id.*, at 135. *Griffin* thus sheds no light on the constitutional status of private police forces, and we express no opinion here.

-----End Footnotes-----

IV

[***HR1D] Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting § 7-210. Our cases state "that [HN8] a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Adickes*, 398 U.S., at 170. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State. The Court rejected a similar argument in *Jackson*, 419 U.S., at 357:

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

"Approval by a state utility commission of such a request from a regulated utility, [**1738] where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" (Emphasis added.)

The clearest demonstration of this distinction appears in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), which held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory [***199] rules. These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as "authorization" [*165] or "encouragement." See *id.*, at 190 (BRENNAN, J., dissenting).

It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. It was recognized in the earliest interpretations of the Fourteenth Amendment "that [HN9] a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State" infringing rights protected thereby. *Virginia v. Rives*, 100 U.S. 313, 318 (1880). If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

Not only is this notion completely contrary to that "essential dichotomy," *Jackson*, *supra*, at 349, between public and private acts, but it has been previously rejected by this Court. In *Evans v. Abney*, 396 U.S. 435, 458 (1970), our Brother BRENNAN in dissent contended that a Georgia statutory provision authorizing the establishment of trusts for racially restricted parks conferred a "special power" on testators taking advantage of the provision. The Court nevertheless concluded that the State of Georgia was in no way responsible for the purely private choice involved in that case. By the same token, the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings.

[*166]

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State has acted, but that it has refused to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

We conclude that the allegations of these complaints do not establish a violation of these respondents' Fourteenth Amendment rights by either petitioner Flagg Brothers or the State of New York. The District Court properly concluded that their complaints failed to state a claim for relief under 42 U. S. C. § 1983. The judgment of the Court of Appeals holding otherwise is

Reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases.

DISSENTBY: MARSHALL; STEVENS

DISSENT: [***200] MR. JUSTICE MARSHALL, dissenting.

Although I join my Brother STEVENS' dissenting opinion, I write separately to emphasize [**1739] certain aspects of the majority opinion that I find particularly disturbing.

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor. See, e. g., *Beal v. Doe*, 432 U.S. 438, 455-457 (1977) (MARSHALL, J., dissenting); *United States v. Kras*, 409 U.S. 434, 458-460 (1973) (MARSHALL, J., dissenting). It blandly asserts that "respondent Jones . . . could have sought to replevy her goods at any time under state law." Ante, at 160. In order to obtain replevin in New York, however, respondent Jones would first have had to present to a sheriff an "undertaking" from a surety by which the latter would be bound to pay "not less than twice the value" of the goods involved and perhaps substantially more, depending in [*167] part on the size of the potential judgment against the debtor. N. Y. Civ. Prac. Law § 7102 (e) (McKinney Supp. 1977). Sureties do not provide such bonds without receiving both a substantial payment in advance and some assurance of the debtor's ability to pay any judgment awarded.

Respondent Jones, according to her complaint, took home \$87 per week from her job, had been evicted from her apartment, and faced a potential liability to the warehouseman of at least \$335, an amount she could not afford. App. 44a-46a. The Court's assumption that respondent would have been able to obtain a bond, and thus secure return of her household goods, must under the circumstances be regarded as highly questionable. * While the Court is technically correct that respondent "could have sought" replevin, it is also true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding eviction and the seizure of her household goods by the warehouseman. But we cannot close our eyes to the realities that led to this litigation. Just as respondent lacked the funds to prevent eviction, it seems clear that, once her goods were seized, she had no practical choice but to leave them with the warehouseman, where they were subject to forced sale for nonpayment of storage charges.

-----Footnotes-----

* New York's replevin statutes have been challenged by poor persons on the ground that they violated equal protection because the poor could not obtain the required "undertaking." See *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716 (NDNY 1970) (three-judge court); *Tamburro v. Trama*, 59 Misc. 2d 488, 299 N. Y. S. 2d 528 (1969).

-----End Footnotes-----

I am also troubled by the Court's cavalier treatment of the place of historical factors in the "state action" inquiry. While we are, of course, not bound by what occurred centuries ago in England, see ante, at 163 n. 13, the test adopted by the Court itself requires us to decide what functions have been "traditionally exclusively reserved to the State," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (emphasis added). Such an issue plainly cannot be resolved in a historical vacuum. New York's highest [***201] court has stated that "[in] [*168] [New York] the execution of a lien . . . traditionally has been the function of the Sheriff." *Blye v. Globe-Wernicke Realty Co.*, 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713-714 (1973). Numerous other courts, in New York and elsewhere, have reached a similar conclusion. See, e. g., *Sharrock v. Dell Buick-Cadillac, Inc.*, 56 App. Div. 2d 446, 455, 393 N. Y. S. 2d 166, 171 (1977) ("[The] garageman in executing his lien . . . is performing the traditional function of the Sheriff and is clothed with the authority of State law"); *Parks v. "Mr. Ford,"* 556 F.2d 132, 141 (CA3 1977) (en banc) ("Pennsylvania has quite literally delegated to private individuals, [forced-sale] powers 'traditionally exclusively reserved' to sheriffs and constables"); *Cox Bakeries, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356, 358 (CA8 1977) (Clark, J.) (by giving a warehouseman forced-sale powers, "the state has delegated the traditional roles of judge, jury and sheriff"); *Hall v. Garson*, 430 F.2d 430, 439 (CA5 1970) ("The execution of a lien . . . has in Texas traditionally [**1740] been the function of the Sheriff or constable").

By ignoring this history, the Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere." Ante, at 160 n. 10. The state-action doctrine, as developed in our past cases, requires that we come down to earth and decide the issue here with careful attention to the State's traditional role.

I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

Respondents contend that petitioner Flagg Brothers' proposed sale of their property to third parties will violate the Due Process Clause of the Fourteenth Amendment. Assuming, [*169] *arguendo*, that the procedure to be followed would be inadequate if the sale were conducted by state officials, the Court holds that respondents have no federal protection because the case involves nothing more than a private deprivation of their property without due process of law. In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the State's authorization of certain creditors' remedies. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601; *Fuentes v. Shevin*, 407 U.S. 67; *Sniadach v. Family Finance Corp.*, 395 U.S. 337.

There is no question in this case but that respondents have a property interest in the possessions that the warehouseman proposes to sell. n1 It is also clear that, whatever power of sale the warehouseman has, it does not derive from the consent of [***202] the respondents. n2 The claimed power derives solely from the State, and specifically from § 7-210 of the New York Uniform Commercial Code. The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections. n3

-----Footnotes-----

n1 Of course the warehouseman may also have a property interest and the ultimate resolution of the due process issue will require a balancing of these interests. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 604.

n2 Although the petitioners have at various stages of this case contended that there was an "implied contract" between the warehouseman and respondents providing for the sale of respondents' possessions in satisfaction of a lien, the Court of Appeals rejected this claim, 553 F.2d 764, 767 n. 3, and petitioners conceded in this Court that, taking respondents' allegations as fact, as we must, there is no contractual issue in this case. Tr. of Oral Arg. 11.

n3 It could be argued that since the State has the power to create property interests, it should also have the power to determine what procedures should attend the deprivation of those interests. See *Arnett v. Kennedy*, 416 U.S. 134, 153-154 (REHNQUIST, J.). Although a majority of this Court has never adopted that position, today's opinion revives the theory in a somewhat different setting by holding that the State can shield its legislation affecting property interests from due process scrutiny by delegating authority to private parties.

-----End Footnotes-----

[*170] In determining that New York's statute cannot be scrutinized under the Due Process Clause, the Court reasons that the warehouseman's proposed sale is solely private action because the state statute "permits but does not compel" the sale, *ante*, at 165 (emphasis added), and because the warehouseman has not been delegated a power "exclusively reserved to the State," *ante*, at 158 (emphasis added). Under this approach a State could enact laws authorizing [**1741] private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute could authorize the warehouseman to retain all proceeds of the lien sale, even if they far exceeded the amount of the alleged debt; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize "any person with sufficient physical power," *ante*, at 157, to acquire and sell the property of his weaker neighbor. An attempt to challenge the validity of any such outrageous statute would be defeated by the reasoning the Court uses today: The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.

As these examples suggest, the distinctions between "permission" and "compulsion" on the one hand, and "exclusive" and "nonexclusive," on the other, cannot be determinative factors in state-action analysis. There is no great chasm

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

between "permission" and "compulsion" requiring particular state action to fall within one or the other definitional camp. Even *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, upon which the Court relies for its distinction between "permission" and [*171] "compulsion," recognizes that there are many intervening levels of state involvement in private conduct that may support a [***203] finding of state action. n4 In this case, the State of New York, by enacting § 7-210 of the Uniform Commercial Code, has acted in the most effective and unambiguous way a State can act. This section specifically authorizes petitioner Flagg Brothers to sell respondents' possessions; it details the procedures that petitioner must follow; and it grants petitioner the power to convey good title to goods that are now owned by respondents to a third party. n5

-----Footnotes-----

n4 In *Moose Lodge* the Court found state action on the basis of the Liquor Control Board's regulation which required that "[every] club licensee shall adhere to all of the provisions of its Constitution and By-Laws." As the Court recognized, this regulation was neutral on its face, see 407 U.S., at 178, and did not compel the Lodge to adopt a discriminatory membership rule.

n5 In fact, § 7-210 (5) (1964) provides:

"A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section."

-----End Footnotes-----

While Members of this Court have suggested that statutory authorization alone may be sufficient to establish state action, n6 it is not necessary to rely on those suggestions in this case because New York has authorized the warehouseman to perform what is clearly a state function. The test of what is a state function for purposes of the Due Process Clause has been variously phrased. Most frequently the issue is presented in terms of whether the State has delegated a function traditionally and historically associated with sovereignty. See, e. g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353; *Evans v. Newton*, 382 U.S. 296, 299. In this Court, petitioners have attempted to argue that the nonconsensual transfer [*172] of property rights is not a traditional function of the sovereign. The overwhelming historical evidence is to the contrary, however, n7 [**1742] and the Court wisely does not adopt this position. Instead, the Court reasons that state action cannot be found because the State has not delegated to the warehouseman an exclusive sovereign function. n8 This distinction, [***204] however, [*173] is not consistent with our prior decisions on state action; n9 is not even adhered to by the Court in this case; n10 and, most importantly, is inconsistent with the line of cases beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337.

-----Footnotes-----

n6 See, e. g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (STEWART, J., concurring); *id.*, at 727 (Frankfurter, J., dissenting); and *id.*, at 729 (Harlan, J., dissenting).

n7 The New York State courts have recognized that the execution of a lien is a traditional function of the State. See *Blye v. Globe-Wernicke Realty Co.*, 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713-714 (1973). See also 3 W. Blackstone, Commentaries §§ 7-11, pp. *3-6, which notes that the right of self-help at common law was severely limited.

I fully agree with the Court that the decision of whether or not a statute is subject to due process scrutiny should not depend on "whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

Georgian England." Ante, at 163 n. 13 (citation omitted). Nonetheless some reference to history and well-settled practice is necessary to determine whether a particular action is a "traditional state function." See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345. Indeed, in *Jackson* the Court specifically referred to Pennsylvania decisions, rendered in 1879 and 1898, which had rejected the contention that the furnishing of utility services was a state function. *Id.*, at 353.

n8 See ante, at 157-158. As I understand the Court's notion of "exclusivity," the sovereign function here is not exclusive because there may be other state remedies, under different statutes or common-law theories, available to respondents. Ante, at 159-160. Even if I were to accept the notion that sovereign functions must be "exclusive," the Court's description of exclusivity is incomprehensible. The question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity. For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action. See *Griffin v. Maryland*, 378 U.S. 130. Under the Court's analysis, however, there would be no state action if the State provided a remedy, such as an action for wrongful imprisonment, for the individual injured by the "private" policeman. This analysis is not based on "exclusivity," but on some vague, and highly inappropriate, notion that respondents should not complain about this state statute if the State offers them a glimmer of hope of redeeming their possessions, or at least the value of the goods, through some other state action. Of course, the availability of other state remedies may be relevant in determining whether the statute provides sufficient procedural protections under the Due Process Clause, but it is not relevant to the state-action issue.

n9 The Court, for instance, attempts to distinguish *Evans v. Newton*, 382 U.S. 296. Newton concededly involved a function which is not exclusively sovereign -- the operation of a park, but the Court claims that Newton actually rested on a determination that the city was still involved in the "daily maintenance and care of the park." Ante, at 159 n. 8. This stark attempt to rewrite the rationale of the Newton opinion is fully answered by MR. JUSTICE WHITE's opinion in that case. MR. JUSTICE WHITE observed:

"It is . . . evident that the record does not show continued involvement of the city in the operation of the park -- the record is silent on this point." 382 U.S., at 304.

n10 As the Court is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as "education, fire and police protection, and tax collection." Ante, at 163.

-----End Footnotes-----

Since *Sniadach* this Court has scrutinized various state statutes regulating the debtor-creditor relationship for compliance with the Due Process Clause. See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600; *Fuentes v. Shevin*, 407 U.S. 67. In each of these cases a finding of state action was a prerequisite to the Court's decision. The Court today seeks to explain these findings on the ground that in each case there was some element of "overt official involvement." Ante, at 157. Given the facts of those cases, this explanation is baffling. In *North Georgia Finishing*, for instance, the official involvement of the State of Georgia consisted of a court clerk who issued a writ of garnishment based solely on the affidavit of the creditor. 419 U.S., at 607. The clerk's actions were purely ministerial, and, until today, this Court had never held that purely ministerial [*174] acts of "minor governmental functionaries" were sufficient to establish state action. n11 The suggestion that this was the basis for due process review in *Sniadach*, *Shevin*, and *North Georgia Finishing* [**1743] marks a major and, in my judgment, unwise expansion of the state-action doctrine. The number of private actions in which a governmental functionary [***205] plays some ministerial role is legion; n12 to base due process review on the fortuity of such governmental intervention would demean the majestic purposes of the Due Process Clause.

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

-----Footnotes-----

n11 See, e. g., *Parks v. "Mr. Ford,"* 556 F.2d 132, 148 (CA3 1977) (en banc) (Adams, J., concurring); *Gibbs v. Titelman*, 502 F.2d 1107, 1113 n. 17 (CA3 1974), cert. denied sub nom. *Gibbs v. Garver*, 419 U.S. 1039; *Shirley v. State Nat. Bank of Connecticut*, 493 F.2d 739, 743 n. 5 (CA2 1974).

n12 For instance, state officials often perform ministerial acts in the transferring of ownership in motor vehicles or real estate. See *Burke & Reber, State Action, Congressional Power and Creditors' Rights: An Essay on The Fourth Amendment*, 47 S. Cal. L. Rev. 1, 19-23 (1973). It is difficult to believe that the Court would hold that all car sales are invested with state action. See *Parks v. "Mr. Ford,"* supra, at 141.

-----End Footnotes-----

Instead, cases such as *North Georgia Finishing* must be viewed as reflecting this Court's recognition of the significance of the State's role in defining and controlling the debtor-creditor relationship. The Court's language to this effect in the various debtor-creditor cases has been unequivocal. In *Fuentes v. Shevin* the Court stressed that the statutes in question "[abdicated] effective state control over state power." 407 U.S., at 93. And it is clear that what was of concern in *Shevin* was the private use of state power to achieve a nonconsensual resolution of a commercial dispute. The state statutes placed the state power to repossess property in the hands of an interested private party, just as the state statute in this case places the state power to conduct judicially binding sales in satisfaction of a lien in the hands of the warehouseman.

"Private parties, serving their own private advantage, [*175] may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters." *Ibid.*

This same point was made, equally emphatically, in *Mitchell v. W. T. Grant Co.*, supra, at 614-616, and *North Georgia Finishing*, supra, at 607. Yet the very defect that made the statutes in *Shevin* and *North Georgia Finishing* unconstitutional -- lack of state control -- is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional scrutiny by removing even the mechanical supervision.

Not only has the State removed its nominal supervision in this case, n13 it has also authorized a private party to exercise a governmental power that is at least as significant as the power exercised in *Shevin* or *North Georgia Finishing*. In *Shevin*, the Florida statute allowed the debtor's property to be seized and held pending the outcome of the creditor's action for repossession. The property would not be finally disposed of until [***206] there was an adjudication of the underlying claim. Similarly, in *North Georgia Finishing*, the state statute provided for a garnishment procedure which deprived the debtor of the use of property in the garnishee's hands pending the outcome of litigation. The warehouseman's power under § 7-210 is far broader, as the Court of Appeals pointed out: [*176] "After giving the bailor specified notice, . . . the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally." 553 F.2d 764, 771.

-----Footnotes-----

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

n13 Of course, the State does "supervise" the warehouseman's actions in the sense that it prescribes the procedures that warehousemen must follow to complete a legally binding sale.

-----End Footnotes-----

[*1744] Whether termed "traditional," "exclusive," or "significant," the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny. This, at the very least, is the teaching of *Sniadach*, *Shevin*, and *North Georgia Finishing*.

It is important to emphasize that, contrary to the Court's apparent fears, this conclusion does not even remotely suggest that "all private deprivations of property [will] be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner." Ante, at 165. The focus is not on the private deprivation but on the state authorization. "[What] is always vital to remember is that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack." Friendly, *The Dartmouth College Case* and *The Public-Private Penumbra*, 12 *Texas Quarterly*, No. 2, p. 17 (1969) (Supp.) (emphasis in original). The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged.

My analysis in this case thus assumes that petitioner *Flagg Brothers'* proposed sale will conform to the procedure specified by the state legislature and that respondents' challenge therefore will be to the constitutionality of that process. It is only what the State itself has enacted that they may ask the federal court to review in a § 1983 case. If there should be a deviation from the state statute -- such as a failure to give the [*177] notice required by the state law -- the defect could be remedied by a state court and there would be no occasion for § 1983 relief. This point has been well established ever since this Court's first explanations of the state-action doctrine in the *Civil Rights Cases*, 109 U.S. 3, 17:

"[Civil] rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by [***207]resort to the laws of the State for redress." n14

-----Footnotes-----

n14 Furthermore, if the warehouseman has deviated from the statutory requirements, the statute would not provide him with the kind of support that would justify the conclusion that he acted "under color of law." With respect to this requirement of § 1983, while I agree with the majority that the concepts of "under color of law" and "state action" may be separately analyzed, see *Lucas v. Wisconsin Electric Co.*, 466 F.2d 638, 654-655 (CA7 1972), normally as a practical matter they embody the same test of state involvement. See *United States v. Price*, 383 U.S. 787, 794 n. 7.

-----End Footnotes-----

On the other hand, if there is compliance with the New York statute, the state legislative action which enabled the deprivation to take place must be subject to constitutional challenge in a federal court. n15 Under this approach, the federal courts do not have jurisdiction to review every foreclosure proceeding in which the debtor claims that there has been a procedural defect constituting a denial of due process of law. Rather, the federal district court's jurisdiction under [*178] § 1983 is limited to challenges to the constitutionality of the state procedure itself -- challenges of the kind considered in *North Georgia Finishing* and *Shevin*.

-----Footnotes-----

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

n15 Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a state court.

-----End Footnotes-----

Finally, it is obviously true that the overwhelming majority of disputes in our society are resolved in the private sphere. But it is no longer possible, if it ever was, to [**1745] believe that a sharp line can be drawn between private and public actions. n16 The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its "exclusive" powers. As indicated, I believe that this limitation is neither logical nor practical. More troubling, this description of what is state action does not even attempt to reflect the concerns of the Due Process Clause, for the state-action doctrine is, after all, merely one aspect of this broad constitutional protection.

-----Footnotes-----

n16 See, e. g., Thompson, Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application To Self-Help Repossession, 1977 Wis. L. Rev. 1; Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 S. Ct. Rev. 221; Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961).

-----End Footnotes-----

In the broadest sense, we expect government "to provide a reasonable and fair framework of rules which facilitate commercial transactions" *Mitchell v. W. T. Grant Co.*, 416 U.S., at 624 (POWELL, J., concurring). This "framework of rules" is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause. n17 The power to order legally [***208] binding [*179] surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.

-----Footnotes-----

n17 Mr. Justice Harlan explained this principle as follows:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." *Boddie v. Connecticut*, 401 U.S. 371, 375.

-----End Footnotes-----

REFERENCES:

436 U.S. 149, *; 98 S. Ct. 1729, **;
56 L. Ed. 2d 185, ***; 1978 U.S. LEXIS 90

78 Am Jur 2d, Warehouses 122 et seq.

19 Am Jur Legal Forms 2d, Uniform Commercial Code--Article 7--Warehouse Receipts, Bills of Lading and Other Documents of Title 253:2681 et seq.

42 USCS 1983; Constitution, 14th Amendment

US L Ed Digest, Civil Rights 12.5; Constitutional Law 314, 520

ALR Digests, Civil Rights 1.3; Constitutional Law 256, 441.5

L Ed Index to Annos, Civil Rights; Due Process of Law; Equal Protection of the Laws; Uniform Commercial Code

ALR Quick Index, Discrimination, Due Process of Law; Equal Protection of Law; Uniform Commercial Code, Warehousemen

Federal Quick Index, Civil Rights; Due Process of Law; Equal Protection of the Laws; Uniform Commercial Code; Warehouses and Warehousemen

Annotation References :

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. 44 L Ed 2d 745.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS 1983) providing private right of action for violation of federal rights. 43 L Ed 2d 833.

Supreme Court's view as to applicability, to conduct of private person or entity, of equal protection and due process clauses of the Fourteenth Amendment. 42 L Ed 2d 922.

Construction and effect of UCC Art 7, dealing with warehouse receipts, bills of lading, and other documents of title. 21 ALR3d 1339.

Peter J. FOURNIER v. UNITED STATES FIDELITY & GUARANTY COMPANY
No. 728, September Term, 1989

Court of Special Appeals of Maryland

82 Md. App. 31; 569 A.2d 1299; 1990 Md. App. LEXIS 32; 5 BNAIER CAS 226; 115 Lab. Cas. (CCH) P56,242

February 28, 1990

SUBSEQUENT HISTORY: [***1] Certiorari Denied May 30, 1990.

PRIOR HISTORY:

APPEAL FROM THE Circuit Court for Baltimore City, Thomas Ward, Judge.

DISPOSITION: JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sought review of the order of the Circuit Court for Baltimore City (Maryland), which entered summary judgment in favor of appellee employer in a wrongful termination action.

OVERVIEW: Employee took employment with employer, completed an application for employment, and received an employment confirmation letter and an employee handbook containing the personnel policy. Employee was terminated after suffering deficiencies in his job performance related to operation of a company he organized. Employee brought suit for wrongful termination, the trial court entered summary judgment for employer, and employee sought review. The court affirmed because the employment confirmation letter did not offer a unilateral contract by which employee could only be terminated for cause, employee acknowledged in writing that he could be terminated at will, employee could not rely on the employee manual that his employment would only be terminated after certain procedures were followed, and employer did not induce employee by representations that he could not be terminated at will.

OUTCOME: The court affirmed the summary judgment for employer.

CORE TERMS: personnel, contractual, terminated, handbook, notice, summary judgment, career, disclaimer, employment contract, termination, supervisor, modified, at-will, stock, enforceable, discharged, guidelines, pleasure, vacant, terminating, involvement, counseling, promptly, trouble, session, justifiably relied, sub judice, distributed, terminable, indefinite

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN1] One who is employed for an indefinite duration may be discharged at any time at the pleasure of his employer. Nevertheless, when an employer communicates personnel policy statements to its employees which limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment, such statements, if justifiably relied on by its employee, may become contractual undertakings by the employer that are enforceable by its employee.

COUNSEL: Charles Lee Nutt (Clements & Nutt, on the brief), all of Baltimore, Maryland, for appellant.

Stephen D. Shawe (Mark J. Swerdlin and Shawe & Rosenthal, on the brief), all of Baltimore, Maryland, for appellee.

JUDGES: Bishop, Karwacki, Richard M. Pollitt (Retired, Specially Assigned), JJ.

82 Md. App. 31, *, 569 A.2d 1299, **;
1990 Md. App. LEXIS 32, ***; 5 BNA IER CAS 226

OPINIONBY: KARWACKI

OPINION: [*32] [**1299] On June 24, 1987, Peter J. Fournier, the appellant, filed an action in the Circuit Court for Baltimore City against United States Fidelity and Guaranty Company, the appellee, alleging that his employment by appellee had been wrongfully terminated. He sought compensatory and punitive damages. After the parties had conducted discovery, appellee moved for summary judgment. Following a hearing on [*33] that motion and appellant's opposition thereto, the court entered summary judgment in favor of the appellee. In his appeal from that judgment appellant questions the propriety of the court's disposition of his claim by summary judgment.

FACTS

The record before the hearing judge, when viewed most favorably to the appellant, Rule 2-501(a); [***2] Berkey v. Delia, 287 Md. 302, 304-05, 413 A.2d 170 (1980); Laws v. Thompson, 78 Md. App. 665, 673-674, 554 A.2d 1264 (1989), discloses the following material facts on which the summary judgment was based.

In September of 1984 appellant met with an employee recruiter for the appellee and with two persons in appellee's Business Planning Group, Mr. Everett G. Miller, and Ms. Teriko Goodwyn. At the conclusion of those interviews he was told that he would be hearing from them later.

Appellant was asked to return on September 28, 1984. He again met with Mr. Miller who advised him that appellee was prepared to offer him a position as a Principal Analyst in its Business Planning Group. On that day appellant completed an application for employment. The following paragraph prominently appeared above the line on which appellant signed the application:

I understand that, if I am employed, it will be for a trial period of three months; that, if in the judgment of the Company I am unsuitable during this period, the employment may be terminated by the Company without notice; and that, after this trial period, the employment [***3] may be terminated by either party at will upon two [**1300] weeks' notice to the other. In any event, all obligation on the Company's part as respects salary shall end with the last day I work.

Appellant's employment by appellee was confirmed in a letter dated October 10, 1984, which he received from Mr. [*34] R. G. Strother of appellee's Human Resources Department and Ms. Goodwyn. That letter stated:

We would like to confirm our offer and your acceptance for the position of Principal Analyst in the Data Processing Department. In this position you will be reporting directly to Teriko Goodwyn, Acting Supervisor, and your starting salary will be \$750.00/weekly, paid bi-weekly, with a starting date of October 15, 1984.

We are very pleased that you are considering pursuing your career with USF & G. It is our firm belief that your skills, work experience, education, and potential will enable you to contribute to the continued success of USF & G. We equally believe that we as a Company can provide you with the opportunity for both professional and personal career advancement.

As a routine procedure, we have initiated an investigation of your employment background. Our offer is contingent [***4] upon favorable verifications; however, we do not anticipate any problems.

We would like you to respond to our offer with a written acceptance to Bob Strother, Human Resources Department, as soon as possible. In your acceptance letter, please confirm your actual starting date and Social Security Number. Along with your acceptance letter, please complete and return the attached Medical History Form. On your first day, please report to Bob Strother, in the Human Resources Department, on the 4th floor, at 9:00 a.m. At that time you will need to provide proof of age for enrollment in our Pension Plan, so please bring with you your Driver's License or original birth certificate.

We would like to welcome you and wish you every success in your career with USF & G. If you have any questions regarding your offer, the position, or the Company, please don't hesitate to call either of us.

82 Md. App. 31, *, 569 A.2d 1299, **;
1990 Md. App. LEXIS 32, ***; 5 BNA IER CAS 226

Appellant accepted this formal offer and went to work for appellee. For the first year of his employment appellant's [*35] job performance was more than satisfactory to his supervisors.

Approximately two weeks after appellant began working for appellee, he attended an orientation program for new [***5] employees. At that time he received an employee handbook entitled "Employee's Guide to Personnel Practices." Under the section of the handbook entitled "Terminations" the following appears:

DISMISSALS

The Company intends to make every effort to avoid terminating an employee's service. It is recognized that dishonesty, misconduct or insubordination must be dealt with promptly. Dismissals for other causes are resorted to only after efforts to remedy the trouble have failed. Length of service is considered in determining the amount of notice or separation pay in lieu of notice but in no event will it be less than two weeks for employees with more than three months service. An effort is also made to provide time off to seek other employment before the termination becomes effective.

That personnel policy was in effect at the time appellant was employed by appellee, and it remained in effect through the date of his discharge.

During November of 1985 the Business Planning Group to which appellant had been assigned was disbanded, and appellant was transferred to the Capacity Planning Group, supervised by Ms. Kit Fechtig. Appellant's salary remained the same while his duties [***6] changed somewhat.

Appellant began to demonstrate deficiencies in his job performance shortly after his transfer to the Capacity Planning Group. In December of 1985 he failed to complete five of six assignments which he had been given by his supervisor. He was reprimanded by his supervisor on two occasions between December 10, 1985, and January [**1301] 15, 1986. On one occasion he arrived late at work and left one hour early. On January 10, 1986, he took an extended lunch [*36] break and missed a scheduled meeting with the superintendent of the Capacity Planning Group.

Appellant admitted that he missed the January 10, 1986, meeting in order to keep an appointment with the director of admissions at St. Agnes Hospital relating to a company he had organized in September of 1985 named "Caesar Software." Appellant formed that company with the participation of his fellow employees, Everett G. Miller and Mark Wolkow. They planned to develop and market software for a hospital operating room scheduling and management system. Miller and Wolkow each received 5% of the stock of Caesar Software for their work in getting the enterprise started. Appellant planned to issue 51% of the stock to himself [***7] for his services and to sell the other 39% of the stock to outside investors. By January 13, 1986, appellant, Miller, and Wolkow had been successful in selling \$18,000 worth of the stock to their relatives and fellow employees at appellee. The three men also contracted with Carl Evans, another employee of appellee, to perform computer programming work for Caesar Software.

During late 1985 and early 1986 appellant worked 20 to 25 hours a week on the business of Caesar Software, but contended that none of this work was done during his working hours at appellee. He admitted that he discussed that business with Miller and Wolkow while at work for appellee, but stated that these discussions did not interfere with any of their duties. He further admitted that he made and received telephone calls concerning his outside enterprise while at work for appellee, but he testified that these calls were only for the purpose of arranging meetings after his working hours at appellee.

By January 13, 1986, the hierarchy of appellee had learned of appellant's involvement with Caesar Software. He was summoned to a meeting with Walter Zilahy, Vice President of appellee's data processing division, [***8] John Witzen, Vice President of appellee's internal audit division, and Frank Bossle, Assistant Vice President of appellee's internal [*37] audit division. They asked appellant to explain his involvement in Caesar Software which appellant did.

Mr. Zilahy was in charge of the investigation and had the ultimate authority to determine what action should be taken. Zilahy decided to fire appellant and did so on January 17, 1986. He also took disciplinary action against Miller, Wolkow, and Evans for their involvement in Caesar Software. They received written reprimands which were placed in their personnel files maintained by appellee.

DISCUSSION

In *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981), the Court of Appeals reaffirmed the common law rule that [HN1] one who is employed for an indefinite duration may be discharged at any time at the pleasure of his employer. Nevertheless, when an employer communicates personnel policy statements to its employees which "... limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment . . .", such statements, if justifiably [***9]relied on by its employee, may "... become contractual undertakings by the employer that are enforceable by its employee." *Staggs v. Blue Cross of Md., Inc.*, 61 Md. App. 381, 392, 486 A.2d 798 (1985), cert. denied, 303 Md. 295, 493 A.2d 349 (1985).

Appellant concedes, as he must, that when he applied for employment by appellee he knew, or should have known, that appellee disclaimed any intention of employing appellee for a fixed term or of limiting its discretion to terminate appellant's employment at its pleasure. That was unequivocally set forth in the application for employment which appellant completed and signed on September 28, 1984. Appellant contends, however, that appellee expressed a contrary intention in the letter addressed to him on October 10, 1984, by Mr. Strother of appellee's Human Resources Department and Ms. Goodwyn and in certain personnel policy statements [**1302] made by appellee which appear in the "Employee's Guide to Personnel Practices" which appellant [*38] received at the orientation program for new employees of appellee. We shall address each of those alternatives in turn.

A. The October [***10] 10 Letter.

This letter, which we have quoted in full above, confirmed appellee's offer and appellant's acceptance of the position for which appellant applied on September 28, 1984. Appellant argues that appellee modified the at-will employment contract which he was offered on September 28 by not mentioning that type of employment contract in the letter and by the following statement which appears therein:

We are very pleased that you are considering pursuing your career with USF & G. It is our firm belief that your skills, work experience, education, and potential will enable you to contribute to the continued success of USF & G. We equally believe that we as a Company can provide you with the opportunity for both professional and career advancement.

We are not persuaded.

The precatory language in the letter relied on by appellant falls far short of an expression by appellee of an offer of a unilateral contract of employment to appellant which only could be terminated by appellee for cause. These statements do not possess the contractual quality of those we reviewed in *Staggs v. Blue Cross of Md., Inc.*, supra.

In *Staggs* the employer's [***11] personnel policy statement issued to its employees provided in pertinent part:
'TV. Employees terminating due to dismissal are subject to the following conditions:

A. Except in extreme cases when dismissal will be immediate, employees will be given at least two formal counseling sessions by their supervisors and/or manager before final dismissal. All formal counseling sessions must be first reviewed with the Employment and Employee Relations Department prior to any discussion with the employee. Formal counseling sessions with employees [*39] must be substantiated in writing by filing form 5.65 Problem Solving Report with the Employment and Employee Relations Department. During the second counseling session, the employee will be advised that continuance of the problem may result in dismissal. Failure to sign form 5.65, Problem Solving Report after it has been discussed, may provide grounds for immediate dismissal.

...

E. An employee may be dismissed at any time for cause without liability to Blue Cross and Blue Shield of Maryland.'

Id. at 384-85, 486 A.2d 798.

82 Md. App. 31, *, 569 A.2d 1299, **;
1990 Md. App. LEXIS 32, ***; 5 BNA IER CAS 226

We held that these provisions, if properly expressed and communicated, [***12] were offers of a unilateral contractual undertaking by the employer which, if accepted by the employee by continuing his employment, modified the original contract of employment which was terminable at the discretion of the employer. *Id.* at 392, 486 A.2d 798. In so holding, we hastened to add:

. . . Not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant. As the Minnesota Court observed in *Pine River State Bank [v. Mettille]*, *supra*, 333 N.W.2d [622] at 626 [Minn. 1983], 'general statements of policy are no more than that and do not meet the contractual requirements for an offer.'

Id. at 392, 486 A.2d 798.

In *MacGill v. Blue Cross of Md., Inc.*, 77 Md. App. 613, 551 A.2d 501 (1989), cert. denied, 315 Md. 692, 556 A.2d 673 (1989), we distinguished *Staggs*. In that case an employee sued his employer for breach of employment contract. He alleged that the employer had failed to comply with the personnel guidelines which it had published in filling three vacant positions for which he [***13] had applied. The employee contended that the following guidelines became contractual undertakings by the employer, modifying his contract of employment:

[*40] '1. Memo No. 200.60, requiring "each and every member of management to [**1303] administer these [personnel] policies in a consistent and impartial manner."

2. Memo No. 200.45(C3), requiring certain vacant positions to be posted corporate wide; the personnel representative to screen applicants for minimum job qualifications; and the personnel representative to make a job offer to selected applicant and "promptly notify the remaining applicants of their status," "[i]f the decision is properly supported."

3. Memo No. 200.32(C2) endorsing and committing itself "to equal opportunity regardless of race, religion, color, age, sex, political affiliation, mental or physical handicap or national origin in employment . . ."; "to take affirmative action to employ, advance in employment and otherwise treat qualified . . . veterans of the Vietnam era without discrimination based upon their . . . veteran status in all employment practices . . ."; and "to be consistent in our practices of treating all employees and/or applicants, [***14] whether or not members of minority groups, equally according to their individual merit, qualifications, ability, experience, and other bona fide occupational standards".£ (Footnote omitted.)

Id. at 615, 551 A.2d 501.

Rejecting the employee's view of these personnel guidelines, Judge Robert M. Bell, speaking for the Court, explained:

The long and short of this case is that the personnel policies relied upon by appellant as establishing contractual undertakings, on the part of appellee, that are enforceable by appellant, under the circumstances sub judice, simply are not sufficient. They are no more than 'general statements of policy', which do not, and indeed could not, 'meet the contractual requirements for an offer.'£ Personnel policies that specifically prescribe and limit the procedures that an employer must use in filling vacant positions, but do not prescribe with whom they are [*41] to be filled, do not rise to the level of contractual undertakings. And they are not elevated to that status by allegations that one of the applicants is more qualified than the other applicants.

Id. at 620, 551 A.2d 501.

[***15] See also *Hillsman v. Sutter Community Hospitals of Sacramento*, 153 Cal. App. 3d 743, 200 Cal. Rptr. 605 (3 Dist. 1984). In *Hillsman* the plaintiff claimed that a letter of understanding setting forth his terms of employment had modified his negotiated contract for at-will employment. He based that claim on the following language used by the employer in that letter: "'We look forward to a long, pleasant, and mutually satisfactory relationship with you and the Sutter Community Hospitals'."£ *Id.* 200 Cal. Rptr. at 608. The Court held that this language was insufficient to constitute an offer of a contractual undertaking by the employer, stating that it was ". . . immediately apparent that the language relied on by plaintiff expresses a mere hope or expectation . . ." and did not change plaintiff's at-will employment status. *Id.* 200 Cal. Rptr. at 609.

B. The Employee's Guide to Personnel Practices

Appellant contends that the following provision appearing in the employee's handbook was an offer of contractual undertaking by appellee which, when accepted by appellant, modified his contract [***16] for at-will employment:

The Company intends to make every effort to avoid terminating an employee's service. It is recognized that dishonesty, misconduct or insubordination must be dealt with promptly. Dismissals for other causes are resorted to only after efforts to remedy the trouble have failed.

He asserts that he was fired without the benefit of any "efforts to remedy the trouble" required by this personnel policy of appellee.

In *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 517 A.2d 786 (1986), cert. denied, 309 Md. 325, 523 A.2d 1013 (1987), we considered a similar contention by a discharged [*42] employee. The personnel policy provision there was also contained within an employee handbook which had been distributed to the employees of the hospital. [***1304] That handbook, however, contained an express disclaimer by the employer:

'Finally, this handbook does not constitute an express or implied contract. The employee may separate from his/her employment at any time; the Hospital reserves the right to do the same.'

Id. at 329, 517 A.2d 786.

We distinguished [***17] *Staggs v. Blue Cross of Md., Inc.*, supra, and affirmed the summary judgment entered in favor of the hospital on the employee's suit for damages for alleged breach of employment contract; we explained our reasoning:

The purpose of the Staggs exception to the at will doctrine is to protect the legitimate expectations of employees who have justifiably relied on manual provisions precluding job termination except for cause. Justifiable reliance is precluded where, as in the case at hand, contractual intent has been expressly disclaimed.

Castiglione, supra, 69 Md. App. at 341, 517 A.2d 786 (citation omitted). We believe that rationale is fully applicable to the case sub judice.

When appellant applied for a position with appellee, he acknowledged in writing that the employment he sought could be terminated by either the employer or employee ". . . at will upon two weeks' notice to the other."£ In light of that acknowledgement appellant could not justifiably rely on any indication in the employee manual that his employment would only be terminated after certain procedures were followed by appellee. The disclaimer [***18] of any contractual intent to the contrary on the part of appellee effectively barred such reliance.

The fact that in this case the disclaimer appeared in the application for employment rather than in the handbook itself is not a material distinction. *Reid v. Sears, Roebuck* [*43] and Co., 790 F.2d 453 (6th Cir. 1986) is apposite. In that case the discharged employees had completed applications for employment which contained the following provision: 'In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck, and Co., and my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or myself.'

Id. at 456.

The Reid court, applying Michigan law, agreed with Sears that the disclaimer in the application precluded the formation of a contract based on language contained in the personnel practices handbook which Sears had distributed to its employees:

The feature that distinguishes the present case from *Toussaint* [v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (Mich. 1980).] [***19] and all other Michigan decisions relied upon by the plaintiffs is the unequivocal language contained in the application for employment that each of the plaintiffs signed. *Toussaint* makes it clear that an employer can defeat claims that an employee could be discharged only for good cause by 'requiring

82 Md. App. 31, *, 569 A.2d 1299, **;
1990 Md. App. LEXIS 32, ***, 5 BNA IER CAS 226

prospective employees to acknowledge that they serve[] at the will or pleasure of the company . . . '£ 408 Mich. at 612, 292 N.W.2d 880 [, 891] (emphasis added). Since the acknowledgement should be obtained from prospective employees, Sears properly included this provision of employment in the application form rather than in some documents to be signed by the employee after he or she was hired.

Id. at 461.

Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981), which is relied on by appellant, is distinguishable. In that case the plaintiff, who was 53 years of age, was removed by Ford from his position as Superintendent of Production in 1977. Prior to accepting that management position, he had worked for Ford under a [*44] union contract which provided him with job security. The written contract [***20] governing his employment in management provided, however, that he could be terminated at will by Ford at any time. Plaintiff alleged that he had been induced to sign that contract by oral promises of his employer that he could be employed until he reached age [**1305]65 and that Ford's "literature, policy and practices" also led him to believe that he would be employed until the normal retirement age of 65. In light of those alleged representations the court held that a jury question was presented as to whether Ford was estopped from relying on the provision in the written contract stating that plaintiff's employment was at will. There is no evidence in this case that appellant was induced to complete the application for employment by appellee by any representations that his employment could not be terminable at the will of appellee.

JUDGMENT AFFIRMED;

COSTS TO BE PAID BY THE APPELLANT.

GERTZ v. ROBERT WELCH, INC.
No. 72-617

SUPREME COURT OF THE UNITED STATES

418 U.S. 323; 94 S. Ct. 2997; 41 L. Ed. 2d 789; 1974 U.S.LEXIS 88; 1 Media L. Rep. 1633

November 14, 1973, Argued
June 25, 1974, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 471 F.2d 801, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner attorney challenged the decision of the United States Court of Appeals for the Seventh Circuit, which held that petitioner was a public figure and the New York Times standard applied in his defamation action. Accordingly, the court of appeals affirmed the district court's grant of a judgment notwithstanding the verdict in favor of respondent publisher.

OVERVIEW: After a policeman killed a youth, the youth's family retained petitioner to represent them in a civil action. During the trial, respondent published an article about petitioner that labeled him as a "Communist" and a member of a Marxist organization. Because the statements contained serious inaccuracies, petitioner filed a libel action against respondent. The district court held that the New York Times standard applied, which meant respondent escaped liability unless petitioner proved publication of defamatory falsehood with actual malice. The district court entered judgment for respondent and the court of appeals affirmed. The Supreme Court reversed and remanded, holding that petitioner was not a public figure. The state interest in compensating injury to the reputation of a private individual required a different rule. The Court held that the states could define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual. The states could not permit recovery of presumed or punitive damages absent a showing of knowledge of falsity or reckless disregard for the truth.

OUTCOME: The Court reversed the court of appeals' decision and held that the facts showed petitioner was a private figure. The Court held that the state interest in compensating a private figure required a different rule and held that the states could define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual. The case was remanded for a new trial.

CORE TERMS: defamation, libel, First Amendment, reputation, defamatory, publisher, reckless disregard, public figure, media, punitive damages, falsehood, public official, falsity, defamatory falsehood, fault, newspaper, slander, public interest, actionable, actual injury, general interest, broadcaster, constitutional privilege, self-censorship, presumed, common law, plurality, injury to reputation, general damages, freedom of speech

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN1] Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, the court depends for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

advances society's interest in and wide-open debate on public issues. They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Torts: Defamation & Invasion of Privacy

[HN2] Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN3] Allowance of the defense of truth, with the burden of proving it on defendant, does not mean that only false speech will be deterred. The First Amendment requires that the court protect some falsehood in order to protect speech that matters.

Torts: Defamation & Invasion of Privacy: Libel

[HN4] The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN5] The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Torts: Defamation & Invasion of Privacy

[HN6] The state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN7] The first remedy of any victim of defamation is self-help, using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN8] Public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN10] The accommodation of the competing values at stake in defamation suits by private individuals allows the states to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times. This conclusion is not based on a belief that the considerations which prompted the adoption of the New York Times privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, the court endorses this approach in recognition of the

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury.

Torts: Damages: Punitive Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] The states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Torts: Damages: Punitive Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN12] There is no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. The private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

Torts: Defamation & Invasion of Privacy

[HN13] The designation of a public official may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

SUMMARY: After a police officer had been convicted of murder, the attorney who represented the murder victim's family in a civil suit against the officer, and who attended the coroner's inquest into the victim's death, was discussed in a magazine article which inaccurately (1) portrayed the attorney as an architect of a "frame-up" of the officer, (2) implied that the attorney had a criminal record, and (3) identified the attorney as a "Leninist," a "Communist-fronter," and a former official of a Marxist organization. In the attorney's libel action against the publisher of the magazine, in the United States District Court for the Northern District of Illinois, the District Court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded \$50,000 to the plaintiff. On further reflection the District Court concluded that the First Amendment rule, requiring proof of defendant's knowledge or reckless disregard of the falsity of the defamatory statements, protected discussion of any public issue without regard to the status of the plaintiff as a public officer or public figure. Accordingly the court entered judgment n.o.v. for defendant (322 F Supp 997). The United States Court of Appeals for the Seventh Circuit affirmed (471 F2d 801).

On certiorari, the United States Supreme Court reversed and remanded the case for a new trial. In an opinion by Powell, J., expressing the view of five members of the court, it was held that (1) the First Amendment protection afforded news media against defamation suits by public persons is not to be extended to defamation suits by private individuals even though the defamatory statements concern an issue of public or general interest; (2) so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual; (3) defamation plaintiffs who do not prove the First Amendment requirement are restricted to recovery of compensation for actual injury, excluding punitive damages; (4) the plaintiff-attorney was neither a public official nor a public figure within the First Amendment rule; and (5) a new trial was necessary because the jury was allowed to impose liability without fault and to presume damages without proof of injury.

Blackmun, J., concurring, joined the opinion of the court on the ground that his vote was needed to create a majority and that otherwise he would adhere to his prior view that the extension, in an earlier case, of the First Amendment rule to an event of public interest was logical.

Burger, Ch. J., dissented, expressing the view that he would prefer the area of the defamation law with respect to private citizens to evolve as it has up to now, rather than embark on a new doctrine without jurisprudential ancestry, and that he would remand for reinstatement of the jury's verdict and the entry of an appropriate judgment on that verdict.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

Douglas, J., dissented on the ground that the First and Fourteenth Amendments prohibit the imposition of damages in a defamation action against a publisher for the discussion of public affairs; he would affirm the judgment below.

Brennan, J., dissented on the ground that the states are required to apply the First Amendment knowing-or-reckless-falsity standard in civil libel actions concerning communications media reports of the involvement of private individuals in events of public or general interest; because of plaintiff's failure to prove this standard, he would affirm the judgment of the Court of Appeals.

White, J., dissented, expressing the view that, at least at the present stage of state law, states should be free to impose strict liability for defamation in actions brought by private plaintiffs against communications media; he would reinstate the jury's verdict.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

certiorari -- publisher's constitutional privilege --

Headnote:

The United States Supreme Court will grant certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.

[***HN2]

n.o.v. -- surprise --

Headnote:

The entry of a judgment for defendant, notwithstanding the jury's verdict for the plaintiff, on the basis of plaintiff's failure to show, in his libel action against a publisher, the latter's knowledge or reckless disregard of falsity of the defamatory statements does not constitute unfair surprise nor deprive plaintiff of a full and fair opportunity to prove actual malice, as required by the First Amendment, where (1) the trial court, although initially concluding that the applicability of the First Amendment rule depended on plaintiff's status as a public figure, did not decide that plaintiff was not a public figure until all the evidence had been presented, (2) plaintiff knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing evidence that defendant acted with reckless disregard for the truth, and this question remained open throughout the trial; and (3) plaintiff had every opportunity, indeed incentive, to prove reckless disregard if he could, and in fact attempted to do so.

[***HN3]

defamation action against public persons -- prerequisites --

Headnote:

For the purposes of the First Amendment rule requiring "actual malice" on the part of the defendant publisher in a defamation action brought by a public person and defining malice as defendant's knowledge or reckless disregard of the falsity of the defamatory statement, a false statement made in support of a false thesis is protected; the actual falsity of the statement is not the determinative factor, since a contrary rule might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements.

[***HN4]

defamation of public figure -- reckless disregard of truth -- proof --

Headnote:

For the purpose of the First Amendment rule requiring "actual malice" on the part of a defendant publisher in a defamation action brought by a public person and defining such malice as reckless disregard of the falsity of the

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

defamatory statement, mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth; rather, the publisher must be shown to act with a high degree of awareness of probable falsity.

[***HN5]

defamation of private persons -- First Amendment standard --

Headnote:

A newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure is not entitled to claim that the First Amendment protection afforded in defamation suits by public officers or public figures, requiring proof of defendant's knowledge or reckless disregard of the falsity of a defamatory statement, be extended to defamation suits by private individuals, even though the defamatory statements concern an issue of public or general interest.

[***HN6]

free speech and press -- false ideas --

Headnote:

Under the First Amendment there is no such thing as a false idea; however pernicious an opinion may seem, its correction depends not on the conscience of judges and juries but on the competition of other ideas.

[***HN7]

free speech and press -- false statements of fact --

Headnote:

There is no constitutional value in false statements of facts; neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues; they belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

[***HN8]

free speech and press -- defamation -- by communications media -- proof of truth --

Headnote:

Allowing the communications media to avoid liability for defamation only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties; the First Amendment requires protection of some falsehood in order to protect speech that matters.

[***HN9]

defamation -- relative powers of federal and state government --

Headnote:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory statements; an individual's right to protection of his own good name is left primarily to the individual states under the Ninth and Tenth Amendments, but this does not mean that the right is entitled to any less recognition by the United States Supreme Court as a basic right under the federal constitutional system.

[***HN10]

free speech and press -- redressing injury by defamation --

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

Headnote:

The United States Supreme Court, in its continuing effort to define the proper accommodation between the need for a vigorous uninhibited press and the legitimate interest in redressing wrongful injury by defamation, is especially anxious to assure to the freedoms of speech and press that breathing space essential to their fruitful exercise.

[***HN11]

free speech and press -- protection of public persons --

Headnote:

The standard defining the level of First Amendment protection appropriate to the context of defamation of a public person is that those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to representation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity and with reckless disregard for the truth; on the other hand, the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

[***HN12]

free speech and press -- defamation actions against communications media -- public person plaintiff -- private plaintiff --

Headnote:

In distinguishing, under the First Amendment knowing-or-reckless falsity standard, among defamation plaintiffs who are public officers or public figures on the one hand and private plaintiffs on the other, the determinative factors are: (1) the remedy of self-help is usually more easily available to public persons who enjoy significantly greater access to the communications media than private individuals, who are therefore more vulnerable to injury; and (2) while public persons invite public attention and have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them, no such assumption is justified with respect to a private individual, who, consequently, is not only more vulnerable to injury than public persons but also more deserving of recovery.

[***HN13]

free speech and press -- defamation action -- state's power --

Headnote:

The states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual, so long as they do not impose liability without fault in violation of the First Amendment guaranty of free speech and press.

[***HN14]

free speech and press -- defamation suit against communications media -- punitive damages --

Headnote:

The First Amendment guaranty of free speech and press allows a state to impose, in defamation suits brought by private individuals, liability on the publisher or broadcaster of defamatory falsehoods on a less demanding showing than in such suits brought by a public person; however, the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

[***HN15]

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

defamation -- common law --

Headnote:

The common law of defamation is an oddity of tort law, since it allows recovery of purportedly compensatory damages without evidence of actual loss; under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication and juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.

[***HN16]

wisdom of state laws --

Headnote:

The United States Supreme Court will not invalidate state law simply because the court doubts its wisdom.

[***HN17]

free speech and press -- defamation actions -- damages -- state law --

Headnote:

The First Amendment's guaranty of free speech and press requires that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved; it is necessary to restrict defamation plaintiffs who do not prove knowledge or reckless disregard of falsity to compensation for actual injury; such injury is not limited to out-of-pocket loss, and the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering; juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

[***HN18]

free speech and press -- defamation actions -- punitive damages --

Headnote:

The First Amendment's guaranty of free speech and press does not allow awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation; punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions; they are not compensation for injury, but private fines levied by civil juries to punish reprehensible conduct and deter its future occurrence.

[***HN19]

free speech and press -- attorney -- public official --

Headnote:

An attorney who represented the family of a murder victim in civil litigation and attended the coroner's inquest into the victim's death is not a public official within the First Amendment rule requiring such official as plaintiff in a defamation action against a publisher or broadcaster to prove knowledge or reckless disregard of falsity on the part of the defendant; the First Amendment rule does not recognize the concept of a "de facto" public official.

[***HN20]

free speech and press -- defamation -- concept of public figure --

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

Headnote:

A public figure within the meaning of the First Amendment rule requiring a public person to prove, as plaintiff in an action against communications media, defendant's knowledge or reckless disregard of falsity, is either an individual who achieves such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts, or an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues; in either case such persons assume special prominence in the resolution of public questions.

[***HN21]

free speech and press -- attorney -- public figure --

Headnote:

An attorney who has long been active in community and professional affairs, has served as an officer of local civic groups and of various professional organizations, and has published several books and articles on legal subjects is not a public figure within the meaning of the First Amendment rule requiring a public figure as plaintiff in a defamation action against communications media to prove knowledge or reckless disregard of falsity on their part, where (1) the attorney, although well-known in some circles, has achieved no general fame or notoriety in the community; (2) none of the prospective jurors called at the trial of the defamation action instituted by the attorney had ever heard of him prior to this litigation; and (3) defendant publisher offered no proof that this response was a typical of the local population.

[***HN22]

free speech and press -- public figure --

Headnote:

In determining the concept of "public figure" for the purposes of the First Amendment rule requiring a public figure as plaintiff in a defamation action against communications media to prove knowledge or reckless disregard of falsity on their part, the United States Supreme Court will not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes; absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life; it is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

[***HN23]

free speech and press -- attorney -- public figure --

Headnote:

An attorney who represented the family of a murder victim in civil litigation and attended the coroner's inquest into the victim's death is not a public figure within the First Amendment rule requiring such a figure as plaintiff in a defamation action against a publisher or broadcaster to prove knowledge or reckless disregard of falsity on the part of the defendant, where (1) he played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client; (2) he took no part in the criminal prosecution of the felon; (3) moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so; and (4) he plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.

[***HN24]

remand for new trial -- erroneous jury verdict --

Headnote:

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

The United States Supreme Court will order a new trial upon remand of a case involving a defamation action by a private individual against a publisher in which the jury was improperly allowed to impose liability without fault and to presume damages without proof of injury.

SYLLABUS: A Chicago policeman named Nuccio was convicted of murder. The victim's family retained petitioner, a reputable attorney, to represent them in civil litigation against Nuccio. An article appearing in respondent's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that petitioner had arranged Nuccio's "frame-up," implied that petitioner had a criminal record, and labeled him a "Communist-fronter." Petitioner brought this diversity libel action against respondent. After the jury returned a verdict for petitioner, the District Court decided that the standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, should apply to this suit. The court concluded that that standard protects media discussion of a public issue without regard to whether the person defamed is a public official as in *New York Times Co. v. Sullivan*, supra, or a public figure, as in *Curtis Publishing Co. v. Butts*, 388 U.S. 130. The court found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth and therefore entered judgment n. o. v. for respondent. The Court of Appeals affirmed. Held:

1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 339-348.

(a) Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is therefore greater than for public officials and public figures. Pp. 343-345.

(b) To extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an ad hoc basis which publications and broadcasts address issues of general or public interest and which do not. Pp. 345-346.

(c) So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent. Pp. 347-348.

2. The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for actual injury. Pp. 348-350.

3. Petitioner was neither a public official nor a public figure. Pp. 351-352.

(a) Neither petitioner's past service on certain city committees nor his appearance as an attorney at the coroner's inquest into the death of the murder victim made him a public official. P. 351.

(b) Petitioner was also not a public figure. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public-figure question should be determined by reference to the individual's participation in the particular controversy giving rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure. Pp. 351-352.

COUNSEL: Wayne B. Giampietro argued the cause and filed briefs for petitioner.

Clyde J. Watts argued the cause and filed a brief for respondent.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

JUDGES: POWELL, J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, post, p. 353. BURGER, C. J., post, p. 354, DOUGLAS, J., post, p. 355, BRENNAN, J., post, p. 361, and WHITE, J., post, p. 369, filed dissenting opinions.

OPINIONBY: POWELL

OPINION: [*325] [***797] [**3000] MR. JUSTICE POWELL delivered the opinion of the Court.

[***HR1] This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U.S. 925 (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard [*326] Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but the neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that [***798]petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society. "

[*327] The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction [**3001] stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted,

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel per se under Illinois law and that consequently petitioner need not plead special damages. 306 F.Supp. 310 (1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. n1 It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Under this rule respondent would escape liability unless [*328] petitioner could prove publication of defamatory falsehood "with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to *American Opinion*.

-----Footnotes-----

n1 Petitioner filed a cross-motion for summary judgment on grounds not specified in the record. The court denied petitioner's cross-motion without discussion in a memorandum opinion of September 16, 1970.

-----End Footnotes-----

The District Court denied respondent's motion for summary judgment in a memorandum opinion of September 16, 1970. The court did not dispute respondent's claim to the protection of the *New York Times* standard. Rather, it concluded that petitioner might overcome the constitutional privilege by making a factual showing sufficient to prove publication of defamatory falsehood in reckless disregard of the truth. During the course of the trial, however, it became clear that the trial court had not accepted all of respondent's asserted grounds for applying the *New York Times* [***799] rule to this case. It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision or a public figure under *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before submission of the case to the jury, the court ruled in effect that petitioner was neither a public official nor a public figure. It added that, if he were, the resulting application of the *New York Times* standard would require a directed verdict for respondent. Because some statements in the article constituted libel per se [*329] under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded \$50,000 to petitioner.

[**3002]

[***HR2] Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict. n2 This conclusion anticipated the reasoning [*330] of a plurality of this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

-----Footnotes-----

n2 322 F.Supp. 997 (1970). Petitioner asserts that the entry of judgment n. o. v. on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record. It is clear that the trial court gave petitioner no reason to assume that the *New York Times* privilege would not be available

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

to respondent. The court's memorandum opinion denying respondent's pretrial motion for summary judgment does not state that the New York Times standard was inapplicable to this case. Rather, it reveals that the trial judge thought it possible for petitioner to make a factual showing sufficient to overcome respondent's claim of constitutional privilege. It states in part:

"When there is a factual dispute as to the existence of actual malice, summary judgment is improper.

....

"In the instant case a jury might infer from the evidence that [respondent's] failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amounted to actual malice, that is, 'reckless disregard' of whether the allegations were true or not. New York Times [Co.] v. Sullivan, [376 U.S. 254,] 279-280 [(1964)]." Mem. Op., Sept. 16, 1970.

Thus, petitioner knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing evidence that respondent acted with reckless disregard for the truth. And this question remained open throughout the trial. Although the court initially concluded that the applicability of the New York Times rule depended on petitioner's status as a public figure, the court did not decide that petitioner was not a public figure until all the evidence had been presented. Thus petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so. The record supports the observation by the Court of Appeals that petitioner "did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded" 471 F.2d 801, 807 n. 15 (1972).

-----End Footnotes-----

[***HR3] [***HR4] Petitioner appealed to contest the applicability of the New [***800] York Times standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding. n3 It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in *Rosenbloom v. Metromedia, Inc.*, supra. The Court of Appeals read *Rosenbloom* to require application of the New York Times standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements [*331] concerned such an issue. n4 After reviewing the record, the Court of Appeals endorsed [*3003] the District Court's conclusion that petitioner had failed to show by clear and [*332] convincing evidence that respondent had acted with "actual malice" as defined by New York Times. There was no evidence that [***801]the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); accord, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75-76 (1964). The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed, 471 F.2d 801 (1972). For the reasons stated below, we reverse.

-----Footnotes-----

n3 The court stated:

"[Petitioner's] considerable stature as a lawyer, author, lecturer, and participant in matters of public import [undermines] the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of New York Times. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article." *Id.*, at 805.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

n4 In the Court of Appeals petitioner made an ingenious but unavailing attempt to show that respondent's defamatory charge against him concerned no issue of public or general interest. He asserted that the subject matter of the article was the murder trial of Officer Nuccio and that he did not participate in that proceeding. Therefore, he argued, even if the subject matter of the article generally were protected by the New York Times privilege, under the opinion of the Rosenbloom plurality, the defamatory statements about him were not. The Court of Appeals rejected this argument. It noted that the accusations against petitioner played an integral part in respondent's general thesis of a nationwide conspiracy to harass the police:

"[We] may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of *New York Times Co. v. Sullivan*, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

"If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about [petitioner] were integral to its central thesis. They must be tested under the New York Times standard." 471 F.2d, at 806.

We think that the Court of Appeals correctly rejected petitioner's argument. Its acceptance might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements. The present case illustrates the point. Respondent falsely portrayed petitioner as an architect of the criminal prosecution against Nuccio. On its face this inaccuracy does not appear defamatory. Respondent also falsely labeled petitioner a "Leninist" and a "Communist-fronter." These accusations are generally considered defamatory. Under petitioner's interpretation of the "public or general interest" test, respondent would have enjoyed a constitutional privilege to publish defamatory falsehood if petitioner had in fact been associated with the criminal prosecution. But this would mean that the seemingly innocuous mistake of confusing petitioner's role in the litigation against Officer Nuccio would destroy the privilege otherwise available for calling petitioner a Communist-fronter. Thus respondent's privilege to publish statements whose content should have alerted it to the danger of injury to reputation would hinge on the accuracy of statements that carried with them no such warning. Assuming that none of these statements was published with knowledge of falsity or with reckless disregard for the truth, we see no reason to distinguish among the inaccuracies.

-----End Footnotes-----

II

[**HR5A] The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making [*333] a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and [**3004] for broadcasting references to "the smut literature racket" and to "girlie-book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the New York Times privilege applicable to the broadcast and reversed. 415 F.2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices n5 who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the New York Times test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To

418 U.S. 323, *, 94 S. Ct. 2997, **,
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

place our holding in the proper context, we preface our discussion of this case with a review of the several Rosenbloom opinions and their antecedents.

-----Footnotes-----

n5 MR. JUSTICE DOUGLAS did not participate in the consideration or decision of Rosenbloom.

-----End Footnotes-----

In [***802] affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BRENNAN's [*334] conclusion for the Rosenbloom plurality that "all discussion and communication involving matters of public or general concern," 403 U.S., at 44, warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel per se under Alabama law. This showing left the Times with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, *id.*, at 279, and announced the constitutional privilege designed to counter that effect:

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280. n6

-----Footnotes-----

n6 *New York Times* and later cases explicated the meaning of the new standard. In *New York Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. 376 U.S., at 287-288. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." In *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill-will. *Garrison v. Louisiana*, 379 U.S. 64 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions and that it governed criticism directed at "anything which might touch on an official's fitness for office." *Id.*, at 77. Finally, in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), the Court stated that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court applied the *New York Times* standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the *New York Times* privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, MR.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

JUSTICE BRENNAN declared that this holding was not an extension of New York Times but rather a parallel line of reasoning applying that standard to this discrete context:

"This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in New York Times. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt v. Baer*, 383 U.S. 75, 91 (STEWART, J., concurring)." 385 U.S., at 390-391.

-----End Footnotes-----

[*335] [**3005] Three [***803] years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension [*336] was announced in *Curtis Publishing Co. v. Butts* and its companion, *Associated Press v. Walker*, 388 U.S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. Walker involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times*. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." n7 The Court extended the constitutional [*337] privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.*, at 164 (Warren, C. J., concurring in result).

-----Footnotes-----

n7 Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players without a Score Card." Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup. Ct. Rev. 267, 275. Only three other Justices joined Mr. Justice Harlan's analysis of the issues involved. In his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand -- that the *New York Times* test reaches both public figures and public officials. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agreed with the Chief Justice on that question. Mr. Justice Black and MR. JUSTICE DOUGLAS reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.

-----End Footnotes-----

In his opinion for the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 [**3006] (1971), MR. JUSTICE BRENNAN took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements [***804] concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id.*, at 43. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

Two Members of the Court concurred in the result in *Rosenbloom* but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by MR. JUSTICE DOUGLAS, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. *Id.*, at 57. MR. JUSTICE WHITE concurred on a narrower ground. *Ibid.* He concluded that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public [*338] servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." *Id.*, at 62. He therefore declined to reach the broader questions addressed by the other Justices.

Mr. Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times v. Curtis Publishing Co.*, he had contested the extension of the privilege to public figures. There he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S., at 155. In his *Curtis Publishing Co.* opinion Mr. Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel . . ." *Id.*, at 153. Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." *Id.*, at 154. Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr v. Matteo*, 360 U.S. 564 (1959), they lacked a strong claim to the protection of the courts.

In *Rosenbloom* Mr. Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, 403 U.S., at 70, and has not voluntarily placed himself in the [*339] public spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages [***805] for defamation on the basis of any standard of care except liability without fault.

MR. JUSTICE MARSHALL dissented in *Rosenbloom* in an opinion joined by MR. JUSTICE STEWART. *Id.*, at 78. He thought that the plurality's "public or general interest" test for determining the applicability of the *New York Times* privilege would involve the courts in the dangerous business of deciding "what information is relevant to [**3007] self-government." *Id.*, at 79. He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Ibid.* MR. JUSTICE MARSHALL therefore reached the conclusion, also reached by Mr. Justice Harlan, that the States should be "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need," so long as the States did not impose liability without fault. *Id.*, at 86. The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . .," *id.*, at 75, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

III

[***HR6] [***HR7] We begin with the common ground. [HN1] Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but [*340] on the competition of other ideas. n8 But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

-----Footnotes-----

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

n8 As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

-----End Footnotes-----

[***HR8] [HN2] Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, *Debates on the Federal Constitution of 1787*, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable [***806] self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan*, supra, at 279: "[HN3] Allowance of the defense of truth, [*341]with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. See *New York Times Co. v. Sullivan*, supra, at 293 (Black, J., concurring); *Garrison v. Louisiana*, 379 U.S., at 80 (DOUGLAS, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S., at 170 [**3008] (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

[***HR9] [HN4] The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

[*342]

[***HR10] Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co. v. Butts*, supra, at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button*, 371 U.S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

[***HR11] [HN5] The *New York Times* standard [***807] defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this [*343] substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the New York Times privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co. v. Sullivan*, supra; *Curtis Publishing Co. v. Butts*, supra. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the New York Times rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that [HN6] the state interest in [**3009] compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." *Rosenbloom v. Metromedia, Inc.*, 403 U.S., at 63 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general [*344] application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

[***HR12] With that caveat we have no difficulty in distinguishing among defamation plaintiffs. [HN7] The first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct [***808]the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. n9 Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

-----Footnotes-----

n9 Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

-----End Footnotes-----

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana*, 379 U.S., at 77, the public's interest extends to "anything [*345]which might touch on an official's fitness for office Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[**3010] Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that [HN8] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." *Curtis Publishing Co. v. Butts*, 388 U.S., at 164 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

[***809] For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a [*346] legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not -- to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

[*347]

[***HR13] [HN9] We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. n10 This approach provides a [***810] [*3011] more equitable [*348] boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." n11 This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

-----Footnotes-----

n10 Our caveat against strict liability is the prime target of MR. JUSTICE WHITE's dissent. He would hold that a publisher or broadcaster may be required to prove the truth of a defamatory statement concerning a private individual and, failing such proof, that the publisher or broadcaster may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. Post, at 388-392. In MR. JUSTICE WHITE's view, one who publishes a statement that later turns out to be inaccurate can never be "without

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

fault" in any meaningful sense, for "[it] is he who circulated a falsehood that he was not required to publish." Post, at 392 (emphasis added).

MR. JUSTICE WHITE characterizes *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as simply a case of seditious libel. Post, at 387. But that rationale is certainly inapplicable to *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), where MR. JUSTICE WHITE joined four other Members of the Court to extend the knowing-or-reckless-falsity standard to media defamation of persons identified as public figures but not connected with the Government. MR. JUSTICE WHITE now suggests that he would abide by that vote, post, at 398, but the full thrust of his dissent -- as we read it -- contradicts that suggestion. Finally, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971), MR. JUSTICE WHITE voted to apply the *New York Times* privilege to media defamation of an individual who was neither a public official nor a public figure. His opinion states that the knowing-or-reckless-falsity standard should apply to media "comment upon the official actions of public servants," *id.*, at 62, including defamatory falsehood about a person arrested by the police. If adopted by the Court, this conclusion would significantly extend the *New York Times* privilege.

MR. JUSTICE WHITE asserts that our decision today "trivializes and denigrates the interest in reputation," *Miami Herald Publishing Co. v. Tornillo*, ante, at 262 (concurring opinion), that it "[scuttles] the libel laws of the States in . . . wholesale fashion" and renders ordinary citizens "powerless to protect themselves." Post, at 370. In light of the progressive extension of the knowing-or-reckless-falsity requirement detailed in the preceding paragraph, one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords.

n11 *Curtis Publishing Co. v. Butts*, supra, at 155.

-----End Footnotes-----

IV

[***HR14] [HN10] Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. [*349] But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that [HN11] the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

[***HR15] The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage [***811] to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any [**3012] system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

[***HR16] [***HR17] We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We [*350] need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

***HR18] [HN12] We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

[*351] V

***HR19] Notwithstanding our refusal to extend the New York Times privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is ***812] either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

***HR20] Respondent's characterization of petitioner as a public figure raises a different question. [HN13] That designation [*3013] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

HR21] [HR22] Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame [*352] or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

***HR23] In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

[***HR5B] [***HR24] We therefore conclude that the New York Times standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted [***813] to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

CONCURBY: BLACKMUN

CONCUR: [*353] MR. JUSTICE BLACKMUN, concurring.

I joined MR. JUSTICE BRENNAN'S opinion for the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). I did so because I concluded that, given *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny (noted by the Court, ante, at 334-336, n. 6), as well as *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), the step taken in *Rosenbloom*, extending the New York Times doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE'S separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply New York Times to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the New York Times doctrine and [**3014] says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom*'s plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to [*354] join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of New York Times malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. See *Curtis Publishing Co. v. Butts*, 388 U.S., at 170 (Black, J., concurring); *Time*, [***814] *Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring); *United States v. Vuitch*, 402 U.S. 62, 97 (1971) (separate statement).

For these reasons, I join the opinion and the judgment of the Court.

DISSENTBY: BURGER; DOUGLAS; BRENNAN; WHITE

DISSENT: MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny this Court entered this field.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional [*355] thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what MR. JUSTICE WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition -- the right to counsel -- would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, [***3015] would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

MR. JUSTICE DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of "[defining] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same [*356] quagmire" in which the Court "is now helplessly struggling in the field of obscenity." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures [***815] and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose proscription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law. n1 This was the view held by Thomas Jefferson n2 and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798 -- a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. n3 The general [*357] consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment. n4

-----Footnotes-----

n1 See, e. g., *Rosenblatt v. Baer*, 383 U.S. 75, 90 (concurring).

n2 In 1798 Jefferson stated:

"[The First Amendment] thereby [guards] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . ." 8 *The Works of Thomas Jefferson* 464-465 (Ford ed. 1904) (emphasis added).

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

n3 See, e. g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840).

n4 Senator Calhoun in reporting to Congress assumed the invalidity of the Act to be a matter "which no one now doubts." Report with Senate Bill No. 122, S. Doc. No. 118, 24th Cong., 1st Sess., 3 (1836).

-----End Footnotes-----

With the First Amendment made applicable to the States through the Fourteenth, n5 I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since "[what] a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co. v. Sullivan*, 376 U.S. 254, 277. Like Congress, States are without power "to use a civil libel law or any other law to impose damages for merely [*3016] discussing public affairs." *Id.*, at 295 (Black, J., concurring).n6

-----Footnotes-----

n5 See *Stromberg v. California*, 283 U.S. 359, 368-369.

n6 Since this case involves a discussion of public affairs, I need not decide at this point whether the First Amendment prohibits all libel actions. "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (Black, J., concurring) (emphasis added). But "public affairs" includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, "Communist conspiracies," and the like qualify.

A more regressive view of free speech has surfaced but it has thus far gained no judicial acceptance. Solicitor General Bork has stated:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1, 20 (1971).

According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also proscribe the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the Government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

-----End Footnotes-----

[*358] Continued [***816] recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection. This view is only possible if one accepts the position that the First Amendment is applicable to the States only through

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

the Due Process Clause of the Fourteenth, due process freedom of speech being only that freedom which this Court might deem to be "implicit in the concept of ordered liberty." n7 But the Court frequently has rested [*359] state free speech and free press decisions on the Fourteenth Amendment generally n8 rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition [*3017] against state abridgment than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the oppressed.

-----Footnotes-----

n7 See *Palko v. Connecticut*, 302 U.S. 319, 325. As Mr. Justice Black has noted, by this view the test becomes "whether the government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of the Supreme Court, to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of First Amendment freedoms. As I have stated many times before, I cannot subscribe to this doctrine because I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." H. Black, *A Constitutional Faith* 52 (1969).

n8 See, e. g., *Bridges v. California*, 314 U.S. 252, 263 n. 6 (Black, J.); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (DOUGLAS, J.); *Saia v. New York*, 334 U.S. 558, 560 (DOUGLAS, J.); *Talley v. California*, 362 U.S. 60, 62 (Black, J.); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 828 (DOUGLAS, J.); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (DOUGLAS, J.); *Mills v. Alabama*, 384 U.S. 214, 218 (Black, J.); *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 221-222, and n. 4 (Black, J.).

-----End Footnotes-----

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are [***817] subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the *American Opinion*, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be [*360] quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

[*361] MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 31-32 (1971); see ante, at 331-332, n. 4. I cannot agree, however, that free and robust debate -- so essential to the proper functioning of our system of government -- is permitted adequate "breathing space," *NAACP v. Button*, 371 U.S. 415, 433 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" Ante, at 348. n1 [***818] I adhere to my view expressed [**3018] in *Rosenbloom v. Metromedia, Inc.*, supra, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

-----Footnotes-----

n1 A fortiori I disagree with my Brother WHITE's view that the States should have free rein to impose strict liability for defamation in cases not involving public persons.

-----End Footnotes-----

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events of public or general interest. It recognizes that self-governance in this country perseveres because of our "profound national commitment [*362] to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, at 270 (emphasis added). Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," *Rosenbloom v. Metromedia, Inc.*, supra, at 41; for "[freedom] of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[the] public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct...." *Rosenbloom*, supra, at 43. Matters of public or general interest do not "suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Ibid.* See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures -- that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth -- is not apt, the Court holds, because [*363] the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I [***819] cannot accept them, for the reasons I stated in *Rosenbloom*:

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

"The New York Times standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public [**3019]eye . . . , the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet [not fully defined] class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial [*364] a reed on which to rest a constitutional distinction." 403 U.S., at 46-47.

Moreover, the argument that private persons should not be required to prove New York Times knowing-or-reckless falsity because they do not assume the risk of defamation by freely entering the public arena "bears little relationship either to the values protected by the First Amendment or to the nature of our society." *Id.*, at 47. Social interaction exposes all of us to some degree of public view. This Court has observed that "[the] risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill*, 385 U.S., at 388. Therefore,

"[voluntarily] or not, we are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See . . . *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." *Rosenbloom, supra*, at 48 (footnote omitted).

To be sure, no one commends publications which defame the good name and reputation of any person: "In an ideal world, the responsibility of the press would match the freedom [***820] and public trust given it." *Id.*, at [*365]51. n2 Rather, as the Court agrees, some abuse of First Amendment freedoms is tolerated only to insure that would-be commentators on events of public or general interest are not "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do [**3020]so." *New York Times Co. v. Sullivan*, 376 U.S., at 279. The Court's holding and a fortiori my Brother WHITE's views, see n. 1, *supra*, simply deny free expression its needed "breathing space." Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

-----Footnotes-----

n2 A respected commentator has observed that factors other than purely legal constraints operate to control the press:

"Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations." T. Emerson, *The System of Freedom of Expression* 538 (1970).

Typical of the press' own ongoing self-evaluation is a proposal to establish a national news council, composed of members drawn from the public and the journalism profession, to examine and report on complaints concerning the

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

accuracy and fairness of news reporting by the largest newsgathering sources. Twentieth Century Fund Task Force Report for a National News Council, *A Free and Responsive Press* (1973). See also Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1569-1570 (1972).

-----End Footnotes-----

We recognized in *New York Times Co. v. Sullivan*, supra, at 279, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when [*366] publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest -- the probable result of today's decision -- will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is "elusive," *Time, Inc. v. Hill*, supra, at 389; it saddles the press with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." Ibid. Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. See *The Supreme Court*, 1970 Term, 85 Harv. L. Rev. 3, 228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.

[***821] "In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' In re *Winship*, 397 U.S. 358, 371 (1970) (HARLAN, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the [*367] possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom*, 403 U.S., at 50.

And, most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. This probability accounts for the Court's limitation that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Ante, at 349. But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's [**3021] broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury" -- however much it reduces the size or frequency of recoveries -- will not provide the necessary elbowroom for First Amendment expression.

"It is not simply the possibility of a judgment for damages that results in self-censorship. The very [*368] possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. . . . Too, a small

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punitive.'" Rosenbloom, *supra*, at 52-53.

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the New York Times standard. I reject the argument that my Rosenbloom view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." n3 I noted in Rosenbloom [*369] [***822] that performance of this task would not always be easy. *Id.*, at 49 n. 17. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that "sizable body of cases, decided both before and after Rosenbloom, that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied Butts to the alleged libel of a public figure." Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

-----Footnotes-----

n3 The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 n. 12, 48-49, n. 17 (1971), I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff -- unable to demonstrate some degree of fault -- from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739-1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. Cf. *Rosenbloom v. Metromedia, Inc.*, *supra*, at 47, and n. 15.

-----End Footnotes-----

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the [***3022] disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante*, at 329-330, n. 2, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE WHITE, dissenting.

For some 200 years -- from the very founding of the Nation -- the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of [*370]state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, [***823] subject only to limited exceptions carved out since 1964.

418 U.S. 323, *, 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the [*371] Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

I

Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply. In 1938, the Restatement of Torts reflected the historic rule that publication in written form of defamatory material -- material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" n1 -- subjected the publisher to liability although no special harm to reputation was actually proved. n2 Restatement [*372] of Torts [**3023]§ 569 (1938). n3 [***824] Truth was a defense, and some libels were privileged; but, given a false circulation, general damage to reputation was presumed and damages could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable per se and thus performed

"a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." Id., § 569, comment b, p. 166.

-----Footnotes-----

n1 Restatement of Torts § 559 (1938); see also W. Prosser, Law of Torts § 111, p. 739 (4th ed. 1971); 1 A. Hanson, Libel and Related Torts para. 14, pp. 21-22 (1969); 1 F. Harper & F. James, The Law of Torts § 5.1, pp. 349-350 (1956).

n2 The observations in Part I of this opinion as to the current state of the law of defamation in the various States are partially based upon the Restatement of Torts, first published in 1938, and Tentative Drafts Nos. 11 and 12 of Restatement of Torts (Second), released in 1965 and 1966, respectively. The recent transmittal of Tentative Draft No. 20, dated April 25, 1974, to the American Law Institute for its consideration has resulted in the elimination of much of the discussion of the prevailing defamation rules and the suggested changes in many of the rules themselves previously found in the earlier Tentative Drafts. This development appears to have been largely influenced by the draftsmen's "sense for where the law of this important subject should be thought to stand." Restatement (Second) of Torts, p. vii (Tent. Draft No. 20, Apr. 25, 1974). It is evident that, to a large extent, these latest views are colored by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). See, e. g., Restatement (Second) of Torts, *supra*, at xiii, §§ 569, 580, 581A, 581B, 621. There is no indication in the latest draft, however, that the conclusions reached in Tentative Drafts Nos. 11 and 12 are not an accurate reflection of the case law in the States in the mid-1960's prior to the developments occasioned by the plurality opinion in *Rosenbloom*. See *infra*, at 374-375.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

n3 See also W. Prosser, *supra*, n. 1, § 112, p. 752 and n. 85; Murnaghan, *From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions*, 22 Cath. U. L. Rev. 1, 11-13 (1972).

-----End Footnotes-----

If the defamation was not libel but slander, it was actionable per se only if it imputed a criminal offense; a venereal or loathsome and communicable disease; improper conduct of a lawful business; or unchastity by a woman. *Id.*, § 570. To be actionable, all other types of slanderous statements required proof of special damage other than actual loss of reputation or emotional distress, that special damage almost always being in the form of material or pecuniary loss of some kind. *Id.*, § 575 and comment b, pp. 185-187.

Damages for libel or slander per se included "harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation." *Id.*, § 621. At the heart of the libel-and-slander-per-se [*373] damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Id.*, § 621, comment a, p. 314. n4 Proof of actual injury to reputation was itself insufficient proof of that special damage necessary to support liability for slander not actionable per se. But if special damage in the form of material or pecuniary loss were proved, general damages for injury to reputation could be had without further proof. "The plaintiff may recover not only for the special harm so caused, but also for general loss of reputation." *Id.*, § 575, comment a, p. 185. n5 The right to recover for [*3024] emotional distress depended upon the defendant's otherwise being liable for either libel or slander. *Id.*, § 623. Punitive damages were recoverable upon proof of special facts amounting to express malice. *Id.*, § 908 and comment b, p. 555.

-----Footnotes-----

n4 Proof of the defamation itself established the fact of injury and the existence of some damage to the right of reputation, and the jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequences of the defamatory words. Restatement of Torts § 621, comment a, p. 314 (1938); see also C. Gately, *Libel and Slander* 1004 (6th ed. 1967); M. Newell, *Slander and Libel* § 721, p. 810 (4th ed. 1924); see generally C. McCormick, *Law of Damages* § 116, pp. 422-430 (1935). In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. *Ibid.*

n5 See also Prosser, *supra*, n. 1, § 112, p. 761; Harper & James, *supra*, n. 1, § 5.14, p. 388; Note, *Developments in the Law -- Defamation*, 69 Harv. L. Rev. 875, 939-940 (1956).

-----End Footnotes-----

[*374] Preparations in the mid-1960's for Restatement (Second) of Torts reflected what were deemed to be substantial changes in the law of defamation, primarily a trend toward limiting per se libels to those where the defamatory nature of the publication is apparent on its face, i. e., where the "defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement." Restatement (Second) of Torts § 569, p. 29 (Tent. Draft No. 12, Apr. 27, 1966). Libels of this sort and slanders per se continued to be recognized as actionable without proof of special damage [***825] or injury to reputation. n6 All other defamations would require proof of special injury in the form of material or pecuniary loss. Whether this asserted change reflected the prevailing law was heavily debated, n7

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

but it was unquestioned at the time that there are recurring situations in which libel and slander are and should be actionable per se.

-----Footnotes-----

n6 Also actionable per se were those libels where the imputation, although not apparent from the material itself, would have been slander per se if spoken rather than written.

n7 Restatement (Second) of Torts § 569, pp. 29-45, 47-48 (Tent. Draft No. 12, Apr. 27, 1966); see also Murnaghan, *supra*, n. 3.

-----End Footnotes-----

In surveying the current state of the law, the proposed Restatement (Second) observed that "[all] courts except Virginia agree that any libel which is defamatory upon its face is actionable without proof of damage" Restatement (Second) of Torts § 569, p. 84 (Tent. Draft No. 11, Apr. 15, 1965). Ten jurisdictions continued to support the old rule that libel not defamatory on its face and whose innuendo depends on extrinsic facts is actionable without proof of damage although slander would not be. Twenty-four jurisdictions were said to hold that libel not defamatory on its face is to be treated like slander and thus not actionable without proof of damage where [*375] slander would not be. *Id.*, § 569, p. 86. The law in six jurisdictions was found to be in an unsettled state but most likely consistent with the Restatement (Second). *Id.*, § 569, p. 88. The law in Virginia was thought to consider libel actionable without proof of special damage only where slander would be, regardless of whether the libel is defamatory on its face. *Id.*, § 569, p. 89. All States, therefore, were at that time thought to recognize important categories of defamation that were actionable per se. n8 Nor was any question apparently raised at that time that upon proof of special damage in the form of material or pecuniary loss, general damages to reputation could be recovered without further proof.

-----Footnotes-----

n8 Applying settled Illinois law, the District Court in this case held that it is libel per se to label someone a Communist. 306 F.Supp. 310 (ND Ill. 1969).

-----End Footnotes-----

Unquestionably, state law continued to recognize some absolute, as well as some conditional, privileges to publish defamatory materials, including the privilege of fair comment in defined situations. But it remained true that in a wide range of situations, the ordinary citizen could make out a prima facie case without proving more than a defamatory publication and could recover general damages for injury to his [***826] reputation unless defeated by the defense of truth. n9

-----Footnotes-----

n9 This appears to have been the law in Illinois at the time Gertz brought his libel suit. See, e. g., *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (CA7 1950); *Hotz v. Alton Telegraph Printing Co.*, 324 Ill. App. 1, 57 N. E. 2d 137 (1944); *Cooper v. Illinois Publishing & Printing Co.*, 218 Ill. App. 95 (1920).

-----End Footnotes-----

418 U.S. 323, *, 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer [**3025] will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable per se. In addition, he must prove some further degree of culpable conduct on the part of the [**376] publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable per se, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should [**377] at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

Of course, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130 (1967), have themselves worked major changes in defamation law. Public officials and public figures, if they are to recover general damages for injury to reputation, must prove knowing falsehood or reckless disregard for the truth. The States were required to conform to these decisions. Thereafter in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), three Members of the [***827] Court urged that the same standard be applied whenever the publication concerned an event of public or general concern. But none of these cases purported to foreclose in all circumstances recovery by the ordinary citizen on traditional standards of liability, and until today, a majority of the Court had not supported the proposition that, given liability, a court or jury may not award general damages in a reasonable amount without further proof of injury.

In the brief period since *Rosenbloom* was decided, at least 17 States and several federal courts of appeals have felt obliged to consider the *New York Times* constitutional privilege for liability as extending to, in the words of the *Rosenbloom* plurality, "all discussion and communication involving matters of public or general concern." *Id.*, at 44. n10 Apparently, however, [**3027] general [**378] [***828] damages still remain recoverable once that standard of liability is satisfied. Except where public officials and public figures are concerned, the Court now repudiates [**379] the plurality opinion in *Rosenbloom* and appears to espouse the liability standard set forth by three other Justices in that case. The States must now struggle to [**380] discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for the recovery of damages. These matters have not been briefed or argued by the parties and their workability has not been seriously explored. Nevertheless, yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.

-----Footnotes-----

n10 See, e. g., *West v. Northern Publishing Co.*, 487 P. 2d 1304, 1305-1306 (Alaska 1971) (article linking owners of taxicab companies to illegal liquor sales to minors); *Gallman v. Carnes*, 254 Ark. 987, 992, 497 S. W. 2d 47, 50 (1973) (matter concerning state law school professor and assistant dean); *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972) (article concerning attorney with national reputation); *Moriarty v. Lippe*, 162 Conn. 371, 378-

418 U.S. 323, *, 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

379, 294 A. 2d 326, 330-331 (1972) (publication about certain police officers); *Firestone v. Time, Inc.*, 271 So. 2d 745, 750-751 (Fla. 1972) (divorce of prominent citizen not a matter of legitimate public concern); *State v. Snyder*, 277 So. 2d 660, 666-668 (La. 1973) (criminal defamation prosecution of a defeated mayoral candidate for statements made about another candidate); *Twohig v. Boston Herald-Traveler Corp.*, Mass. , , 291 N. E. 2d 398, 400-401 (1973) (article concerning a candidate's votes in the legislature); *Priestley v. Hastings & Sons Publishing Co. of Lynn*, 360 Mass. 118, 271 N. E. 2d 628 (1971) (article about an architect commissioned by a town to build a school); *Harnish v. Herald-Mail Co., Inc.*, 264 Md. 326, 334-336, 286 A. 2d 146, 151 (1972) (article concerning substandard rental property owned by a member of a city housing authority); *Standke v. B. E. Darby & Sons, Inc.*, 291 Minn. 468, 476-477, 193 N. W. 2d 139, 145 (1971) (newspaper editorial concerning performance of grand jurors); *Whitmore v. Kansas City Star Co.*, 499 S. W. 2d 45, 49 (Mo. Ct. App. 1973) (article concerning a juvenile officer, the operation of a detention home, and a grand jury investigation); *Trails West, Inc. v. Wolff*, 32 N. Y. 2d 207, 214-218, 298 N. E. 2d 52, 55-58 (1973) (suit against a Congressman for an investigation into the death of schoolchildren in a bus accident); *Twenty-five East 40th Street Restaurant Corp. v. Forbes, Inc.*, 30 N. Y. 2d 595, 282 N. E. 2d 118 (1972) (magazine article concerning a restaurant's food); *Kent v. City of Buffalo*, 29 N. Y. 2d 818, 277 N. E. 2d 669 (1971) (television station film of plaintiff as a captured robber); *Frink v. McEldowney*, 29 N. Y. 2d 720, 275 N. E. 2d 337 (1971) (article concerning an attorney representing a town); *Mead v. Horvitz Publishing Co.* (9th Dist. Ohio Ct. App. June 13, 1973) (unpublished), cert. denied, 416 U.S. 985 (1974) (financial condition of participants in the development of a large apartment complex involving numerous local contractors); *Washington v. World Publishing Co.*, 506 P. 2d 913 (Okla. 1973) (article about contract dispute between a candidate for United States Senate and his party's county chairman); *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 395-399, 286 A. 2d 357, 363-365 (1971) (radio "talk show" host's discussion of gross overcharging for snowplowing a driveway not considered an event of public or general concern); *Autobuses Internacionales S. De R.L., Ltd. v. El Continental Publishing Co.*, 483 S. W. 2d 506 (Tex. Ct. Civ. App. 1972) (newspaper article concerning a bus company's raising of fares without notice and in violation of law); *Sanders v. Harris*, 213 Va. 369, 372-373, 192 S. E. 2d 754, 757-758 (1972) (article concerning English professor at a community college); *Old Dominion Branch No. 496 v. Austin*, 213 Va. 377, 192 S. E. 2d 737 (1972), rev'd, ante, p. 264 (plaintiff's failure to join a labor union considered not an issue of public or general concern); *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 41, 515 P. 2d 154, 156 (1973) (article concerning port district commissioner); *Miller v. Argus Publishing Co.*, 79 Wash. 2d 816, 827, 490 P. 2d 101, 109 (1971) (article concerning the backer of political candidates); *Polzin v. Helmbrecht*, 54 Wis. 2d 578, 586, 196 N. W. 2d 685, 690 (1972) (letter to editor of newspaper concerning a reporter and the financing of pollution control measures).

The following United States Courts of Appeals have adopted the plurality opinion in *Rosenbloom*: *Cantrell v. Forest City Publishing Co.*, 484 F.2d 150 (CA6 1973), cert. pending, No. 73-5520 (article concerning family members of the victim of a highly publicized bridge disaster not actionable absent proof of actual malice); *Porter v. Guam Publications, Inc.*, 475 F.2d 744, 745 (CA9 1973) (article concerning citizen's arrest for theft of a cash box considered an event of general or public interest); *Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (CA8 1972) (article concerning mayor and alleged organized crime connections conceded to be a matter of public or general concern); *Firestone v. Time, Inc.*, 460 F.2d 712 (CA5 1972) (magazine article concerning prominent citizen's use of detectives and electronic surveillance in connection with a divorce); *Davis v. National Broadcasting Co.*, 447 F.2d 981 (CA5 1971), affg 320 F.Supp. 1070 (ED La. 1970) (television report about a person caught up in the events surrounding the assassination of President Kennedy considered a matter of public interest). However, at least one Court of Appeals, faced with an appeal from summary judgment in favor of a publisher in a diversity libel suit brought by a Philadelphia retailer, has expressed "discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law . . ." *Gordon v. Random House, Inc.*, 486 F.2d 1356, 1359 (CA3 1973).

As previously discussed in n. 2, supra, the latest proposed draft of Restatement (Second) of Torts substantially reflects the views of the *Rosenbloom* plurality. It also anticipates "that the Supreme Court will hold that strict liability for defamation is inconsistent with the free-speech provision of the First Amendment . . .," Restatement (Second) of Torts § 569, p. 59 (Tent. Draft No. 20, Apr. 25, 1974), as well as the demise of pre-*Rosenbloom* damages rules. See id., § 621, pp. 285-288.

-----End Footnotes-----

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth v. United States*, 354 U.S. 476, 482 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free [*381] expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. n11 [***829] Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America. n12 Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts. n13

-----Footnotes-----

n11 Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371, 373 (1969).

n12 A. Sutherland, *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* 118-119 (1965).

n13 See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960).

-----End Footnotes-----

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

"[it] is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions." 2 T. Cooley, *Constitutional Limitations* 883 (8th ed. 1927).

Moreover, consistent with the Blackstone formula, n14 these [*382] common-law actions did not abridge freedom of the press. See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 247-248 (1960); Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371, 376 (1969); Hallen, *Fair Comment*, [**3028] 8 Tex. L. Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

"No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is." *Political Freedom, The Constitutional Powers of the People* 21 (1965).

See also Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073, 1080-1081 (1962).

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

-----Footnotes-----

n14 The men who wrote and adopted the First Amendment were steeped in the common-law tradition of England. They read Blackstone, "a classic tradition of the bar in the United States" and "the oracle of the common law in the minds of the American Framers" J. Hurst, *The Growth of American Law: The Law Makers* 257 (1950); Levy, *supra*, n. 13, at 13; see also Sutherland, *supra*, n. 12, at 124-125; *Schick v. United States*, 195 U.S. 65, 69 (1904). From him they learned that the major means of accomplishing free speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious. 4 W. Blackstone, *Commentaries* *150-153.

-----End Footnotes-----

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." *Free Speech in the United States* 14 (1954). n15 At the same time, however, [*383] [***830] he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, n16 "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals." n17

-----Footnotes-----

n15 See also Meiklejohn, *The First Amendment Is An Absolute*, 1961 *Sup. Ct. Rev.* 245, 264:

"First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most revolutionaries, the Framers could not foresee the specific issues which would arise as their 'novel idea' exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

"In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by 'The People' of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed."

n16 See *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black, J., dissenting). Brant, who interprets the Framers' intention more liberally than Chafee, nevertheless saw the free speech protection as bearing upon criticism of government and other political speech. I. Brant, *The Bill of Rights* 236 (1965).

n17 Z. Chafee, *Free Speech in the United States* 14 (1954).

-----End Footnotes-----

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. n18 We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. n19 [*384] Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

"The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others" F. Mott, *Jefferson and the Press* 14 (1943). n20

[**3029] Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371, § 379-380 (1969).

-----Footnotes-----

n18 See 1 Annals of Cong. 729-789 (1789). See also Brant, *supra*, n. 16, at 224; Levy, *supra*, n. 13, at 214, 224.

n19 Merin, *supra*, n. 11, at 377. Franklin, for example, observed:

"If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abused myself." 10 B. Franklin, *Writings* 38 (Smyth ed. 1907).

n20 Jefferson's noted opposition to public prosecutions for libel of government figures did not extend to depriving them of private libel actions. Mott, *supra*, at 43. There is even a strong suggestion that he favored state prosecutions. E. Hudon, *Freedom of Speech and Press in America* 47-48 (1963).

-----End Footnotes-----

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal [***831] law controlled. See, e. g., *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1919); *Baker v. Warner*, 231 U.S. 588 (1913); *Nalle v. Oyster*, 230 U.S. 165 (1913); *Dorr v. United States*, 195 U.S. 138 (1904); *Pollard v. Lyon*, 91 U.S. 225 (1876); *White v. Nicholls*, 3 How. 266 (1845).

The Court's consistent view prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was that defamatory [*385] utterances were wholly unprotected by the First Amendment. In *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907), for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931), the Court adding:

"But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions." *Id.*, at 715.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (footnotes omitted), reflected the same view:

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Beauharnais v. Illinois, 343 U.S. 250, 254-257 (1952) (footnotes omitted), repeated the Chaplinsky statement, noting also that nowhere at the time of the adoption of [*386] the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth v. United States*, 354 U.S., at 483 (footnote omitted), the Court further examined the meaning of the First Amendment:

"In light of this history, it is apparent that the unconditional phrasing of [**3030] the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous [***832] evidence to show that obscenity, too, was outside the protection intended for speech and press." n21

-----Footnotes-----

n21 For further expressions of the general proposition that libels are not protected by the First Amendment, see *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50 and n. 10 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Pennekamp v. Florida*, 328 U.S. 331, 348-349 (1946); cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Stanley v. Georgia*, 394 U.S. 557, 561 n. 5 (1969).

-----End Footnotes-----

The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan*, supra. There the Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semi-official or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid [*387] seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century n22 and also mirrored the views of some later scholars. n23

-----Footnotes-----

n22 See *Levy*, supra, n. 13, at 247-248.

n23 See, e. g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

-----End Footnotes-----

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel -- criticism of government and public officials -- falls beyond the police power of the State. 376 U.S., at 273-276.
n24 In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

neither New York Times nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen." W. Douglas, *The Right of the People* 36 (1958).

-----Footnotes-----

n24 Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 208-209.

-----End Footnotes-----

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment. n25 But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before [*388] the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with [***3031]care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent. n26

-----Footnotes-----

n25 "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument." *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

n26 "[The] law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all of its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled." Rutledge, *The Law of Defamation: Recent Developments*, 32 *Alabama Lawyer* 409, 410 (1971).

The prevailing common-law libel rules in this country have remained in England and the Commonwealth nations. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 *Cornell L. Q.* 581, 583-584 (1964). After many years of reviewing the English law of defamation, the Porter Committee concluded that "though the law as to defamation requires some modification, the basic principles upon which it is founded are not amiss." Report of the Committee on the Law of Defamation, Cmd. No. 7536, para. 222, p. 48 (1948).

-----End Footnotes-----

III

[***833] The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by *New York Times*. But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that the ordinary [*389] citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

publisher beyond the circulation to the public of a damaging falsehood. A rule at least as strict would be called for where the defamatory character of the publication is not apparent from its face. Ante, at 348. n27 Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

-----Footnotes-----

n27 If I read the Court correctly, it clearly implies that for those publications that do not make "substantial danger to reputation apparent," the New York Times actual-malice standard will apply. Apparently, this would be true even where the imputation concerned conduct or a condition that would be per se slander.

-----End Footnotes-----

The Court proceeds as though it were writing on tabula rasa and suggests that it must mediate between two unacceptable choices -- on the one hand, the rigors of the New York Times rule which the Court thinks would give insufficient recognition to the interest of the private plaintiff, and, on the other hand, the prospect of imposing "liability without fault" on the press and others who are charged with defamatory utterances. Totally ignoring history and settled First Amendment law, the Court purports to arrive at an "equitable compromise," rejecting both what it considers faultless liability and New York Times malice, but insisting on some intermediate degree of fault. Of course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where [*390] the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes [***834] notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so -- that he has published the truth. But as it turns out, what he has circulated to the public [**3032] is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. n28 Neither the industry as a whole nor [*391] its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

-----Footnotes-----

n28 A recent study has comprehensively detailed the role and impact of mass communications in this Nation. See Note, Media and the First Amendment in a Free Society, 60 Geo. L. J. 867 (1972). For example, 99% of the American households have a radio, and 77% hear at least one radio newscast daily. In 1970, the yearly average home television viewing time was almost six hours per day. Id., at 883 n. 53.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

"Sixty years ago, 2,442 newspapers were published daily nationwide, and 689 cities had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American daily papers is there a competing newspaper under separate ownership. Total daily circulation has passed 62 million copies, but over 40 percent of this circulation is controlled by only 25 ownership groups.

"Newspaper owners have profited greatly from the consolidation of the journalism industry. Several of them report yearly profits in the tens of millions of dollars, with after tax profits ranging from seven to 14 percent of gross revenues. Unfortunately, the owners have made their profits at the expense of the public interest in free expression. As the broad base of newspaper ownership narrows, the variation of facts and opinions received by the public from antagonistic sources is increasingly limited. Newspaper publication is indeed a leading American industry. Through its evolution in this direction, the press has come to be dominated by a select group whose prime interest is economic.

"The effect of consolidation within the newspaper industry is magnified by the degree of intermedia ownership. Sixty-eight cities have a radio station owned by the only local daily newspaper, and 160 television stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking with the only television station and newspaper under the same control." *Id.*, at 892-893 (footnotes omitted).

See also Congress, FCC Consider Newspaper Control of Local TV, 32 Cong. Q. 659-663 (1974).

-----End Footnotes-----

In [***835] any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom, [*392] particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him [**3033] unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

IV

A

Not content with escalating the threshold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by New York Times [*393] and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddity of tort law." The Court thereby refuses in any case to accept the fact of wide dissemination of a per se libel as prima facie proof of injury sufficient to survive a motion to dismiss at the close of plaintiff's case.

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false. But beyond that, courts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations. Even where libels or slanders are not on their face defamatory and special damage must be shown, when that showing is made, general damages [***836] for reputation injury are recoverable without specific proof. n29

-----Footnotes-----

n29 Having held that the defamation plaintiff is limited to recovering for "actual injury," the Court hastens to add:

"Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Ante, at 350.

It should be pointed out that under the prevailing law, where the defamation is not actionable per se and proof of "special damage" is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable. The Court changes the latter, but not the former, rule. Also under present law, pain and suffering, although shown, do not warrant damages in any defamation action unless the plaintiff is otherwise entitled to at least nominal damages. By imposing a more difficult standard of liability and requiring proof of actual damage to reputation, recovery for pain and suffering, though real, becomes a much more remote possibility.

-----End Footnotes-----

[*394] The Court is clearly right when at one point it states that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Ante, at 344 n. 9. But it ignores what that experience teaches, viz., that damage to reputation is recurrently difficult to prove and that requiring actual proof would repeatedly destroy any chance for [**3034] adequate compensation. Eminent authority has warned that

"it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971). n30

-----Footnotes-----

n30 "The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus some presumptions are necessary if the plaintiff is to be adequately compensated." Note, *Developments in the Law -- Defamation*, 69 Harv. L. Rev. 875, 891-892 (1956).

-----End Footnotes-----

The Court fears uncontrolled awards of damages by juries, but that not only denigrates the good sense of most jurors -- it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained. n31 Available information [*395] tends to confirm that American courts have ably discharged this responsibility. n32

418 U.S. 323, *, 94 S. Ct. 2997, **,
41 L. Ed. 2d 789, ***, 1974 U.S. LEXIS 88

-----Footnotes-----

n31 "On questions of damages, the judge plays an important role. It is, of course, for him to determine and instruct the jury as to what matters may be taken into consideration by them in arriving at a verdict since such questions are clearly matters of substantive law. But the judge also may and frequently does exercise a judgment as to the amount of damages the plaintiff may recover. His function here is primarily to keep the jury within bounds of reason and common sense, to guard against excessive verdicts dictated by passion and prejudice and to see to it that the amount of the verdict has some reasonable relation to the plaintiff's evidence as to his loss or the probability of loss. Thus, the trial judge may grant a new trial or the appellate court may reverse and remand the case for a new trial because of excessive damages or, as is more frequently the case, a remittitur may be ordered, the effect of which is that the plaintiff must accept a specified reduction of his damages or submit to a new trial on the issue of liability as well as damages." 1 F. Harper & F. James, *The Law of Torts* § 5.29, p. 467 (1956) (footnote omitted).

n32 See Pedrick, *supra*, n. 26, at 587 n. 23.

-----End Footnotes-----

The new rule with respect to general damages appears to apply to all [***837]libels or slanders, whether defamatory on their face or not, except, I gather, when the plaintiff proves intentional falsehood or reckless disregard. Although the impact of the publication on the victim is the same, in such circumstances the injury to reputation may apparently be presumed in accordance with the traditional rule. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand. I suggest that judges and juries who must live by these rules will find them equally incomprehensible.

B

With a flourish of the pen, the Court also discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common-law malice, that is, "[actual] malice' in the sense of ill will or fraud or reckless indifference to consequences." [*396] C. McCormick, *Law of Damages* § 118, p. 431 (1935); see also W. Prosser, *supra*, § 113, p. 772; 1 A. Hanson, *Libel and Related Torts* para. 163, p. 133 (1969); Note, *Developments in the Law -- Defamation*, 69 Harv. L. Rev. 875, 938 (1956); Cal. Civ. Code § 48a (4)(d) (1954). In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Ante, at 350. But I see no constitutional difference between publishing with reckless disregard for the truth, where punitive damages will be permitted, and negligent publication where they will not be allowed. It is difficult to understand what is constitutionally [**3035] wrong with assessing punitive damages to deter a publisher from departing from those standards of care ordinarily followed in the publishing industry, particularly if common-law malice is also shown.

I note also the questionable premise that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Ibid. This represents an inaccurate view of established practice, "another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them" n33 While a jury award in any type of civil case may certainly be unpredictable, trial and appellate courts have been increasingly vigilant in ensuring that the jury's result is "based upon a rational consideration of the evidence and the proper application of the [*397] law." *Reynolds v. Pegler*, 123 F.Supp. 36, 39 (SDNY 1954), *aff'd*, 223 F.2d 429 (CA2), cert. denied, 350 U.S. 846 (1955). See *supra*, nn. 31-32. Moreover, some courts require that punitive damages bear a reasonable relation to the compensatory damages award. n34 Still others bar common-law punitive damages or condition their award on a refusal to print a retraction. n35

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

"The danger . . . of immoderate [***838] verdicts, is certainly a real one, and the criterion to be applied by the judge in setting or reducing the amount is concededly a vague and subjective one. Nevertheless the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trial and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction." C. McCormick, *supra*, § 77, p. 278.

-----Footnotes-----

n33 Murnaghan, *supra*, n. 3, at 29.

n34 Note, Developments in the Law -- Defamation, 69 Harv. L. Rev., *supra*, at 875, 938 and n. 443.

n35 *Id.*, at 939, 941-942. See, e. g., Cal. Civ. Code § 48a (2) (1954).

-----End Footnotes-----

The Court points to absolutely no empirical evidence to substantiate its premise. For my part, I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damages awards before retooling the established common-law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses.

Even assuming the possibility that some verdicts will be "excessive," I cannot subscribe to the Court's remedy. On its face it is a classic example of judicial overkill. Apparently abandoning the salutary New York Times policy of case-by-case "'independent examination of the whole record' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on [*398] the field of free expression," n36 the Court substitutes an inflexible rule barring recovery of punitive damages absent proof of constitutional malice. The First Amendment is a majestic statement of a free people's dedication to "uninhibited, robust, and wide-open" debate on public issues, n37 but we do it a grave disservice when we needlessly spend its force. n38 For almost 200 years, punitive damages and the First Amendment have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority's extreme response. I fear that those who read the Court's decision will find its words inaudible, for the Court speaks "only [with] a voice of power, not of reason. [***3036] " *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting).

-----Footnotes-----

n36 376 U.S., at 285.

n37 *Id.*, at 270.

n38 Judicial review of jury libel awards for excessiveness should be influenced by First Amendment considerations, but it makes little sense to discard an otherwise useful and time-tested rule because it might be misapplied in a few cases.

-----End Footnotes-----

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

V

In disagreeing with the Court on the First Amendment's reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); see also *Miami Herald Publishing Co. v. Tornillo*, ante, at 260 (WHITE, J., concurring). I continue to subscribe to the New York Times decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems [*399] from its willingness "to sacrifice good sense to a syllogism" n39 -- to find in the New York Times doctrine an [***839]infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

-----Footnotes-----

n39 O. Holmes, *The Common Law* 36 (1881).

-----End Footnotes-----

Recovery under common-law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not "[pervasively] [involved] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," n40 is simply not forbidden by the First Amendment. A distinguished private study group put it this way:

"Accountability, like subjection to law, is not necessarily a net subtraction from liberty." "The First Amendment was intended to guarantee free expression, not to create a privileged industry." *Commission on Freedom of the Press, A Free and Responsible Press* 130, 81 (1947).

-----Footnotes-----

n40 Ante, at 351, 352.

-----End Footnotes-----

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. n41 If anything, [*400] this trend may provoke a new and radical imbalance in the communications process. Cf. *Barron, Access to the Press -- A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 Yale L. J. 642, 649 (1966); Merin, 11 Wm. & Mary L. Rev., at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." *Democracy and Defamation: [**3037] Fair Game and Fair Comment I*, 42 Col. L. Rev. 1085, 1088 (1942).

-----Footnotes-----

418 U.S. 323, *, 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

n41 Cf. Pedrick, supra, n. 26, at 601-602:

"A great many forces in our society operate to determine the extent to which men are free in fact to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states where the good faith privilege held sway?"

See also T. Emerson, *The System of Freedom of Expression* 519 (1970) (footnote omitted): "[On] the whole the role of libel law in the system of freedom of expression has been relatively minor and essentially erratic."

-----End Footnotes-----

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S., at 86. From all that I have seen, the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise. n42 [*401] At the very least, the issue is highly debatable, [***840] and the Court has not carried its heavy burden of proof to justify tampering with state libel laws. n43

-----Footnotes-----

n42 "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N. Y. U. L. Rev. 962, 1003 (1964).

n43 With the evisceration of the common-law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on personal reputation by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in *Miami Herald Publishing Co. v. Tornillo*, ante, p. 241, which I have joined, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a First Amendment barrier to government "intrusion into the function of editors," ante, at 258, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the First Amendment clearly protects from governmental restraint "the exercise of editorial control and judgment," i. e., "[the] choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair" *Ibid.* (Emphasis added.)

We must, therefore, assume that the hapless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co. v. Tornillo*, ante, at 254; but cf. this case, ante, at 368 n. 3 (BRENNAN, J., dissenting).

My Brother BRENNAN also suggests that there may constitutionally be room for "the possible enactment of statutes, not requiring proof of fault, which provide . . . for publication of a court's determination of falsity if the plaintiff is able

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

to demonstrate that false statements have been published concerning his activities." Ibid. The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

-----End Footnotes-----

[*402] While some risk of exposure "is a concomitant of life in a civilized community," *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

"It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . .

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the [*3038] individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, supra, at 92 (STEWART, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few. n44 Surely, our political "system cannot flourish if regimentation takes hold." *Public Utilities [***841] Comm'n v. Pollak*, 343 U.S. 451, 469 (1952) (DOUGLAS, J., dissenting). Nor can it survive if our people are deprived of an effective method [*403] of vindicating their legitimate interest in their good names. n45

-----Footnotes-----

n44 See n. 28, supra.

n45 "No democracy, . . . certainly not the American democracy, will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to break up private power, or governmental power will be used to regulate private power -- if private power is at once great and irresponsible." *Commission on Freedom of the Press, A Free and Responsible Press* 80 (1947).

-----End Footnotes-----

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

"the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition." B. Cardozo, *Selected Writings* 149 (Hall ed. 1947).

418 U.S. 323, *; 94 S. Ct. 2997, **;
41 L. Ed. 2d 789, ***; 1974 U.S. LEXIS 88

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems" *Mapp v. Ohio*, 367 U.S., at 681 (Harlan, J., dissenting); see also Murnaghan, *From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions*, 22 Cath. U. L. Rev. 1, 38 (1972). [*404] Cf. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

REFERENCES:

50 Am Jur 2d, Libel and Slander 125, 297, 299, 302

16 Am Jur Pl & Pr Forms (rev ed), Libel and Slander Forms 1-4, 24

17 Am Jur Trials 223, Libel Actions by Public Officials

US L Ed Digest, Constitutional Law 927.5, 930

ALR Digests, Constitutional Law 794; Libel and Slander 65, 127

L Ed Index to Annos, Libel and Slander

ALR Quick Index, Libel and Slander; New York Times Rule

Federal Quick Index, Libel and Slander

Annotation References:

Constitutional aspects of libel and slander. 28 L Ed 2d 885.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 ALR3d 988.

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. 19 ALR3d 1361.

Effect of alleged misstatements or misrepresentations in campaign literature, material, or leaflets on validity of representation election. 3 ALR 3d 889.

Constitutional aspects of libel or slander of public officials. 95 ALR2d 1450.

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action. 85 ALR2d 460.

Sufficiency of plaintiff's allegations in defamation action as to defendant's malice. 76 ALR2d 696.

Libel and slander: actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public employee. 53 ALR2d 8.

Excessiveness or inadequacy of damages for defamation. 35 ALR2d 218.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL., APPELLANTS, v. FRANK N. WILNER,
APPELLEE.
No. 99-CV-349

DISTRICT OF COLUMBIA COURT OF APPEALS

760 A.2d 580; 2000 D.C. App. LEXIS 245

April 11, 2000, Argued
October 12, 2000, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the District of Columbia. (Hon. Russell F. Canan, Trial Judge) (Hon. Ellen S. Huvelle, Trial Judge).

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs appealed from Superior Court of the District of Columbia's summary judgment for defendant in libel action over editorial by defendant in trade publication.

OVERVIEW: Plaintiffs were the operator of a freight railroad system in New England and its two owners. Defendant was the author of an editorial column in a trade publication read by persons in the railroad industry and by regulatory officials. In the offending column, defendant discussed an attempt by plaintiffs to purchase or lease certain rail operations. Plaintiffs sued defendant for libel, claiming his column was both expressly and impliedly defamatory and contained demonstrably false statements of fact. They claimed in particular the column falsely portrayed them as hostile and antagonistic to labor and impugned their characters. Defendant responded that the representations were either true, incapable of bearing a defamatory meaning, or protected opinion. The trial court granted defendant summary judgment. The court affirmed, holding the column was an opinion on a matter of public concern and entitled to full constitutional protection as it did not contain a provably false factual connotation. Subjective views were not actionable.

OUTCOME: Summary judgment was affirmed. Imposition of liability on defendant author would have tended to chill robust debate and discussion, an essential part of constitutional tradition. Defendant's column was a subjective assessment and opinion and did not imply provably false facts.

CORE TERMS: column, First Amendment, defamation, defamatory, summary judgment, provably, libelous, railroad, libel, actionable, negotiations, unfair, defamatory meaning, newspaper, transportation, hostile, railroad industry, hostility, lawsuit, statements of fact, labor dispute, stoppage, defamed, bolted, lease, anti-labor, exemption, quotation, statements of opinion, interruption

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN1] Statements of "opinion" are not constitutionally protected if they assert provably false and defamatory facts.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN2] Unless persons, including newspapers, desiring to exercise their U.S. Const. amend. I rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. Self censorship affecting the whole public is hardly less virulent for being privately administered.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN3] In the first instance, it is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Freedom of the Press

[HN4] Summary procedures are particularly important to guarantee robust discussion of matters of public controversy and to protect media defendants from the threat of chilling freedom of the press and speech.

Torts: Defamation & Invasion of Privacy: Libel

[HN5] In order to constitute a libel, a statement must be capable of bearing a defamatory meaning and must be provably false. The court must examine a challenged writing in the entire context in which it was published.

Torts: Defamation & Invasion of Privacy: Libel

[HN6] There is no wholesale definitive exemption for anything that might be labeled opinion, because to have such an exemption for opinion would ignore the fact that expressions of opinion may imply an assertion of verifiably false objective fact.

Torts: Defamation & Invasion of Privacy: Libel

[HN7] A statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore objectively verifiable.

Torts: Defamation & Invasion of Privacy: Libel

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN8] The U.S. Const. amend. I protects statements of imaginative expression and rhetorical hyperbole in order to assure that the public debate will not suffer for lack of these statements, which have traditionally added much to the discourse of the nation.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] Where a journalist is interpreting facts and information, he cannot be held liable for defamation unless no reasonable person could find that the interpretation was supported by the underlying facts.

Torts: Defamation & Invasion of Privacy: False Light Privacy

[HN10] It is not defamatory to call someone reclusive, strange or eccentric, or antiestablishment. Allegedly defamatory remarks must be more than unpleasant or offensive. The language must make the plaintiff appear odious, infamous, or ridiculous.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN11] Whether summary judgment was properly granted is a question of law, and the appellate court reviews de novo a decision granting such relief.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN12] In order to be entitled to summary judgment the moving party must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. D.C. Super. Ct. R. Civ. P. 56(c). The record is viewed in the light most favorable to the party opposing the motion.

Civil Procedure: Appeals: Standards of Review

[HN13] On appeal, the court must assess the record independently, but the substantive standard applied is the same as that utilized by the trial court.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN14] On summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Indeed, while the moving party's papers must be closely scrutinized, the opponent's materials are to be treated "indulgently."

Civil Procedure: Appeals: Standards of Review

[HN15] An appellate court, in a case raising U.S. Const. amend. I issues, must make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Preclusion & Effect of Judgments: Law of the Case Doctrine

[HN16] The law of the case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. The courts have thus held that denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge.

Torts: Defamation & Invasion of Privacy: Libel

[HN17] In the District of Columbia, a statement is defamatory if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community. But not every uncomplimentary publication is libelous. An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous or ridiculous.

Torts: Defamation & Invasion of Privacy: Libel

[HN18] Defamation is that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It necessarily involves the idea of disgrace.

Torts: Defamation & Invasion of Privacy: Libel

[HN19] Words which do not disparage a plaintiff's character are not actionable, even if special damages flow from their publication.

Torts: Defamation & Invasion of Privacy: Libel

[HN20] A publication may convey a defamatory meaning if it tends to lower the plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or of the plaintiff's associates.

Torts: Defamation & Invasion of Privacy: Libel

[HN21] The trial court's threshold task in an action for defamation is to determine whether the challenged statement is capable of bearing a particular meaning, and whether that meaning is defamatory.

Torts: Defamation & Invasion of Privacy: Libel

[HN22] It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule, as a matter of law, that it was not libelous.

Torts: Defamation & Invasion of Privacy: Libel

[HN23] The U.S. Const. amend. I may constrain the application of state defamation law, for libel can claim no talismanic immunity from constitutional limitations.

Torts: Defamation & Invasion of Privacy: Libel

[HN24] Imposition of liability upon an individual on the basis of his words threatens to inhibit speech and to undermine the core values of a free society. The free flow of ideas and opinions is integral to the democratic form of government.

Torts: Defamation & Invasion of Privacy: Libel

[HN25] Because the United States Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo but it must also affirmatively suggest that the author intends or endorses the inference.

Torts: Defamation & Invasion of Privacy: Libel

[HN26] Liability under state defamation law for a statement on a matter of public concern may be imposed only if the statement is provably false.

Torts: Defamation & Invasion of Privacy: Libel

[HN27] A public figure may recover in defamation only if the challenged defamatory statements were made with knowledge of their false implications or with reckless disregard of their truth.

Torts: Defamation & Invasion of Privacy: Libel

[HN28] Statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false. But if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Torts: Defamation & Invasion of Privacy: Libel

[HN29] A statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore objectively verifiable. Assertions of opinion on a matter of public concern receive full constitutional protection if they do not contain a provably false factual connotation.

Civil Procedure: Appeals: Standards of Review

Torts: Defamation & Invasion of Privacy: Libel

[HN30] In order to sustain an action for defamation, the plaintiffs must show both that defendant's column was capable of bearing a defamatory meaning and that it contained or implied provably false statements of fact. On appeal from an order granting summary judgment, the question is whether an impartial jury could reasonably so find.

Torts: Defamation & Invasion of Privacy: Libel

[HN31] A statement or implication that an employer is "hostile" or "antagonistic" to labor, which focuses on his presumed state of mind or which draws inferences regarding that state of mind from his conduct, differs in significant respects from an allegation that the employer has violated a statute which protects the rights of his employees.

Torts: Defamation & Invasion of Privacy: Libel

[HN32] It is the defamatory implication, not the underlying assertions giving rise to the implication, which must be examined to discern whether the statements are entitled to full constitutional protection. In determining the gist or sting of a newspaper article to assess whether it is actionable, a court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance.

Torts: Defamation & Invasion of Privacy: Libel

[HN33] To constitute a libel it is enough that the defamatory utterance imputes any misconduct whatever in the conduct of the plaintiff's calling.

Torts: Defamation & Invasion of Privacy: Libel

[HN34] It is a well settled general rule, supported by both modern and older cases, both British and American, that a publication that charges the plaintiff with a crime or criminal conduct or activity is libelous per se.

Labor & Employment Law: Collective Bargaining & Labor Relations: Duty to Bargain

[HN35] See 45 U.S.C.S. § 152.

Torts: Defamation & Invasion of Privacy: Libel

[HN36] Nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the published article itself.

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

[HN37] An affidavit in opposition to a motion for summary judgment must be based on the affiant's personal knowledge. D.C. Super. Ct. R. Civ. P. 56 (e).

Evidence: Witnesses: Impeachment by Opinion & Reputation

[HN38] An expert witness generally may not express an opinion on a question of law.

COUNSEL: John R. Fornaciari, with whom Robert M. Disch was on the brief, for appellants.

Michael L. Martinez, with whom Edward V. Hickey III was on the brief, for appellee. Rebecca R. Reed and Laura R. Handman filed a brief for The Washington Post Company, Cable News Network LP, LLLP, Gannett Company, Inc., The New Republic, Inc., and The Reporters Committee for Freedom of the Press, Amici Curiae, urging affirmance.

JUDGES: Before SCHWELB, REID, and GLICKMAN, Associate Judges.

OPINIONBY: SCHWELB

OPINION: [*582]

SCHWELB, Associate Judge: This appeal arises from an action for libel. The plaintiffs are Guilford Transportation Industries, Inc. (Guilford), Timothy Mellon, and David Fink. Guilford operates a freight railroad system in New England, consisting of the Maine Central, the Boston and Maine, and Springfield [**2]Terminal railroads. Mellon and Fink founded Guilford in 1981 and own it. Mellon is a member of Guilford's Board of Directors, and Fink manages Guilford's operations. The sole defendant is Frank Wilner, the author of an "Op-Ed" column which appeared on June 2, 1997 in the Journal of Commerce, a trade publication said to be widely read by persons in the railroad industry and by regulatory officials. In this column, a copy of which is appended to this opinion, Wilner discussed an attempt by Guilford to purchase or lease from Amtrak certain rail operations in the northeastern United States.

In their complaint, which was filed on July 8, 1997, the plaintiffs allege that Wilner's column is defamatory and contains demonstrably false statements of fact. Wilner responds that the representations of which the plaintiffs complain are all either true, or incapable of bearing a defamatory meaning, or statements of opinion protected by the First Amendment. In a comprehensive oral ruling in which she focused on the potential of this type of suit for chilling constitutionally protected speech, Judge Ellen S. Huvelle granted summary judgment in favor of Wilner. The plaintiffs now appeal.

"At[**3] the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988). If the First Amendment's guarantees of freedom of speech and of the press are to ensure that these rights are meaningful not simply on paper, but also in the practical context of their exercise, then a newspaper Op-Ed column discussing a subject of public interest must surely be accorded a high level of protection, lest the expression of critical opinions be chilled. This is so because the reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not "hard" news like those printed on the front page or elsewhere in the news sections of the newspaper. [*583] Readers expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere in the newspaper. . . . That proposition is inherent in the very notion of an "Op-Ed page." Because of obvious space limitations, it is also manifest[**4] that columnists or commentators will express themselves in condensed fashion without providing what might be considered the full picture. Columnists are, after all, writing a column, not a full-length scholarly article or a book. This broad understanding of the traditional function of a column like Evans and Novak will therefore predispose the average reader to regard what is found there to be opinion.

Ollman v. Evans, 242 U.S. App. D.C. 301, 317, 750 F.2d 970, 986 (1984) (en banc) (plurality opinion), cert. denied, 471 U.S. 1127, 86 L. Ed. 2d 278, 105 S. Ct. 2662 (1985) (citation and footnote omitted) (discussing a column in the Washington Post by Rowland Evans and Robert Novak).

Although the Supreme Court has made it clear, since *Ollman* was decided, that [HN1] statements of "opinion" are not constitutionally protected if they assert provably false and defamatory facts, see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990), the constitutional principles that animate the passage we have quoted from *Ollman* remain equally compelling and equally good law today. n1 See, e.g., *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 2, 22 F.3d 310, 311,[**5] cert. denied, 513 U.S. 875, 130 L. Ed. 2d 133, 115 S. Ct. 202 (1994) (*Moldea II*) (modifying *Moldea v. New York Times Co.*, 304 U.S. App. D.C. 406, 15 F.3d 1137 (1994) (*Moldea I*)); *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995). " [HN2] Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 35, 365 F.2d 965, 968 (1966), cert. denied, 385 U.S. 1011, 17 L. Ed. 2d 548, 87 S. Ct. 708 (1967). "Self censorship affecting the whole public is 'hardly less virulent for being privately administered.'" *Id.* (quoting *Smith v. California*, 361 U.S. 147, 154, 4 L. Ed. 2d 205, 80 S. Ct. 215

(1959)). [HN3] Moreover, in the first instance, "it is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983)[**6] (per curiam) (adopting Superior Court opinion of Weisberg, J.).

-----Footnotes-----

n1 Although in *Milkovich*, 497 U.S. at 19, the Supreme Court rejected a multi-factor test previously used in *Ollman* and other cases to distinguish fact from opinion, nothing in *Milkovich* affects the continued vitality of *Ollman*'s discussion of Op-Ed columns. See generally Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, Defamation and Privacy Under the First Amendment*, 100 COLUM. L. REV. 294, 318-25 (Jan. 2000).

-----End Footnotes-----

This is not an easy case, for the plaintiffs have submitted affidavits alleging that Wilner's article contains provably false statements of fact and that Wilner has admitted that he knew these statements to be false. After carefully examining the article in light of all of the plaintiffs' allegations, however, we conclude that the foregoing authorities are dispositive of this appeal, and that imposition of liability upon Wilner would tend to chill [**7]the robust debate and discussion which form an essential part of our constitutional tradition. Accordingly, we affirm the judgment in Wilner's favor.

I.

THE FACTS

A. "Guilford's Tempestuous Past."

This controversy began in May of 1997, when Guilford announced its intention to acquire Amtrak's train operations in the [*584] northeastern United States. The prospect of a privatized Amtrak sparked debate throughout the transportation industry. On June 2, 1997, Wilner, an economist who had frequently written on transportation issues, entered the fray with the publication of the column, entitled *Guilford's Tempestuous Past*, n2 which precipitated this litigation. At that time, Wilner was the Chief of Staff to one of the Commissioners of the Surface Transportation Board, which had replaced the Interstate Commerce Commission as the federal agency that regulates railroads and enforces the railway labor laws.

-----Footnotes-----

n2 All parties agree that Wilner did not select and is not responsible for the title of the article, which was apparently chosen by the *Journal of Commerce*, which is not a defendant in this case.

-----End Footnotes-----

[**8]

In "*Guilford's Tempestuous Past*," Wilner began with the rhetorical inquiry "Who is Guilford?" His response was that Guilford was a company created in 1981 when Timothy Mellon, the "38-year-old scion of the Mellon banking fortune . . . tired of a rail-tie manufacturing operation and coveted three of the nation's most ineligible railroads - bankrupt Boston & Maine, comatose Delaware & Hudson and marginally profitable Maine Central." According to Wilner, Mellon and Fink, "a former Pennsylvania Railroad operating officer and fourth-generation railroader," purchased the three railroads and unified them into the "4,000-mile rail system" that became Guilford. Mellon was described in the column as a recluse "with a master's degree in city planning from Yale and an interest in Indian rights."

Wilner then suggested that Guilford itself was a business venture which could only succeed by extracting concessions from labor:

Crucial to making Guilford profitable was cooperation from its 12 disparate labor unions. Quickly, a bitter labor-management conflict was ignited when Guilford bolted from traditional national wage and benefits negotiations. Local negotiations with the Brotherhood of Maintenance^[**9] of Way Employees culminated in an almost three-month strike that required Congressional intervention.

Guilford tried another tack, leasing its component railroads - B&M, D&H, and Maine Central - to a tiny and specialized B&M subsidiary, Springfield Terminal, which enjoyed a concessionary labor contract with the United Transportation Union [UTU].

Before the lease, Springfield Terminal employed just 53 workers. Suddenly it became the de facto operator of the entire Guilford system, employing 2,000 people - and Guilford asserted that all its employees, represented by a dozen different unions, had become covered by Springfield Terminal's UTU contract providing for lower wages and greater work-rules flexibility.

The Interstate Commerce Commission - with a zealous pro-management bias in those days - sanctioned the lease agreement and referred certain labor issues to binding arbitration. When a neutral arbitrator ruled in favor of employees - concluding that existing collective bargaining agreements could no more be scrapped than existing contracts for locomotive fuel - the ICC partially overturned the award.

Wilner also described certain litigation that arose following the lease to ^[**10]Springfield Terminal. He wrote that the "employees demanded new union elections that resulted in a scrapping of [UTU's] single-representation contract with Springfield Terminal in favor of nine separate craft unions." This, in turn, led to more problems for Guilford:

As Guilford - through Springfield Terminal - began negotiating new agreements, work stoppages followed, as did a bankruptcy filing by D&H (which now is owned and operated by Canadian National), appeals to the federal courts of ^[*585] previous ICC decisions and even an allegation by Guilford that arbitrators had been unduly influenced by the New England congressional delegation.

By the early 1990's the cats were herded, but the anti-establishment Mr. Mellon and Mr. Fink already made headlines with equally chaotic legal fisticuffs with Amtrak.

By law, freight railroads are required to host Amtrak trains and to maintain track on those routes to passenger-train specifications. Amtrak pays the cost. But in 1987 Amtrak asserted it was forced to discontinue a New York-Montreal run because of poor maintenance over [a] Boston & Maine track that had slowed passenger-train speeds to 10 miles per hour.

Wilner next related how Amtrak^[**11] ultimately seized the track by using "an extraordinary power granted it by Congress to condemn private property." After summarizing the rather confusing litigation which ensued, Wilner's article concluded:

Guilford has a knack for grabbing headlines. With its latest offer to buy or lease Amtrak's Northeast line, it is bound to keep the story alive.

B. The plaintiffs' allegations of defamation.

The plaintiffs claim that Wilner's column contains numerous defamatory statements, both express and implied. The principal focus of their case is on the allegation that the column falsely portrays them as hostile and antagonistic to labor. The plaintiffs do not allege that Wilner has stated this directly, but they argue instead that the idea is implied by the column's tone and choice of words:

By juxtaposing 'quickly,' 'bitter conflict' 'ignited' and 'traditional national negotiations,' the Article falsely indicates that Guilford caused ^[ignited] a 'bitter conflict' and 'strike' by untowardly and precipitously ^[bolting] from standard ^[traditional] negotiations to further its 'crucial' need to extract 'cooperation' from its '12 disparate labor unions.'

Elaborating on the[**12] theme that Wilner has described them as anti-labor, the plaintiffs claim that they have been implicitly accused of violating the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq., by inciting labor unrest, by causing strikes and work stoppages, and by failing to maintain their tracks properly. They point out that management is under a continuous obligation to make every reasonable effort to avoid any action that might interrupt rail service or impede the free flow of commerce, see 45 U.S.C. § 152 (First), and they assert that the column effectively accuses them of having failed to carry out this obligation. In support of these allegations, the plaintiffs filed, inter alia, a sworn declaration by Herbert R. Northrup, Professor Emeritus of Management at the Wharton School of the University of Pennsylvania, whom the plaintiffs have presented as an expert on labor relations and the RLA. In his declaration, Northrup stated, inter alia, that

. any reader familiar with the railroad industry or the RLA would conclude from reading Wilner's Journal of Commerce, June 2, 1997, article that the plaintiffs are anti-union and anti-labor[**13] and have violated their duties and obligations under the RLA, by failing to exert every effort to make and maintain labor agreements and to avoid interruptions in service as a result of a labor dispute.

. in fact there is no evidence that plaintiffs have failed in their obligations under the RLA, or have exhibited anti-labor biases or ignited labor strikes and work stoppages.

. the article would reasonably tend to injure plaintiffs' reputation within the railroad industry and cause customers to shift their business from Guilford trains to trucks which compete with Guilford for much of its business.

Professor Northrup also synopsisized what the plaintiffs view as provably false [*586] statements of fact in Wilner's column. According to Professor Northrup,

. any expert who has studied the RLA or who was familiar with the history of the railroad industry or who followed Guilford's history would know the following statements, among others, in the Article are false:

. the strike which occurred in 1986 on the Maine Central did not "quickly" occur after Guilford acquired the Maine Central. Negotiations had been ongoing for years before the strike occurred in 1986. Also, the 1986 strike did [**14]not arise from Guilford's attempts to obtain concessions from labor;

. Guilford did not "bolt" from national handling. A railroad must affirmatively opt into national handling and Guilford did not opt into national handling with respect to the labor negotiations on the Maine Central from 1982 through 1986;

. The Springfield Terminal leases had a transportation purpose and the ICC so found. Also, protective conditions ensured that employees of the leased railroads who went to work for Springfield Terminal would not suffer a reduction in compensation or a loss of seniority;

. the union representative elections at the Springfield Terminal in late 1991 and early 1992 did not result in "scrapping" existing labor agreements; the existing labor agreement with the UTU remained in effect for its full six year term;

. negotiations with the newly elected unions at Springfield Terminal after 1991 did not result in work stoppages; agreements were successfully completed without incident;

. the bankruptcy of the Delaware and Hudson did not occur after the union representation elections at Springfield Terminal.

. The Article misstates "Who is Guilford," which is expressly the question the Article[**15] promises to answer.

The plaintiffs further allege that Wilner has defamed Mellon and Fink by describing them as eccentric and strange. The plaintiffs insist that Mr. Mellon is not "reclusive," that neither he nor Mr. Fink has "coveted" any railroads, and that Wilner's assertions to the contrary are verifiably false. The plaintiffs also argue that they are depicted in the column as ineffective businessmen, and that the reference to Mr. Mellon as a "recluse" who "tired of his rail tie manufacturing business," and who engaged in "chaotic legal fisticuffs," conveys to the reader the defamatory implication that Mellon is

not a man of good character, that he is unstable, and that he has an irresponsible attitude towards proper business practices and rail safety.

In opposition to Wilner's motion for summary judgment, the plaintiffs also submitted evidence designed to show knowledge on Wilner's part that his column contained false factual allegations. F. Colin Pease, Guilford's executive vice-president, related in an affidavit that on the day following the publication of the column, he and Fink telephoned Wilner to complain that Wilner had done a "hatchet job" on the plaintiffs. According[**16] to Pease, Wilner "justified the false statements by telling us that he had been given 12 hours to submit the article." Pease stated that Wilner refused to identify the person or persons who gave Wilner the deadline. Pease claimed that during a second telephone conversation, "the defendant later offered to make it up to Guilford by writing a column for another publication, Railway Age, which would be favorable to Guilford." Eight months later, in a sworn deposition, Pease went even further, asserting that "I called Frank Wilner back and when he answered the phone, Frank agreed that the items in the article were false." (Emphasis added.)

Finally, according to the plaintiffs, Wilner's column did more than bruise corporate [*587] egos. Customers who ship their goods by rail are understandably sensitive about potential labor disputes that could result in an interruption of rail service. The plaintiffs claim that after the article was published, a number of Guilford clients called to voice concern over the company's labor practices. One such customer, Joseph Kittredge, stated in a sworn declaration that "any firm which has an anti-labor or anti-union reputation presents a real and unacceptable[**17] risk of interruption in service," and that after reading Wilner's column, he contacted Fink and warned him that, in light of Wilner's allegations, shippers were likely to reallocate their business away from Guilford to other forms of transportation. Elaborating on Mr. Kittredge's account, Fink stated in a sworn declaration that in 1997, following the publication of Wilner's column, Guilford suffered a substantial decline in its business. According to Fink, the column was "the only material adverse event during this time and . . . the only reasonable explanation for this drastic drop-off of performance." On the basis of this type of evidence, the plaintiffs assert that Wilner's column has ascribed to them conduct and characteristics that would tend to injure them "in [their] trade, profession or community standing," *Howard Univ. v. Best*, 484 A.2d 958, 988 (D.C. 1984), or "adversely affect [their] fitness for the proper conduct of [their] lawful business." *Wallace v. Skadden, Arps, Slate, Meagher and Flom*, 715 A.2d 873, 877 (D.C. 1998).

In support of his motion for summary judgment, Wilner submitted extensive materials which contested[**18] most, if not all, of the plaintiffs' allegations. Relying heavily on the "wire service defense," see *Winn v. United Press Int'l*, 938 F. Supp. 39, 44 n.6 (D.D.C. 1996), *aff'd mem.*, 1997 U.S. App. LEXIS 19025 (D.C. Cir. July 14, 1997), Wilner produced numerous prior articles and documents in which Guilford had been described as hostile to labor, and which, according to Wilner, provided substantiation for all of the claims in the column. n3

-----Footnotes-----

n3 Wilner asserted that in response to Pease's claim that Guilford had not "bolted" from national negotiations, he checked with a source who confirmed that Guilford had in fact bolted and that the column was accurate in so stating. Wilner did confirm, however, that he refused to tell Pease who had given Wilner twelve hours to prepare the column. He thus implicitly acknowledged that he was working under such a deadline.

-----End Footnotes-----

C. Judge Canan's ruling.

After the plaintiffs instituted their lawsuit, Wilner filed a motion to dismiss the complaint[**19] for failure to state a claim upon which relief may be granted or, in the alternative, for summary judgment. On December 19, 1997, Honorable Russell F. Canan, the judge to whom the case was initially assigned, denied outright the motion to dismiss the complaint, and he denied the motion for summary judgment without prejudice to refile upon the completion of discovery. The judge recognized that the First Amendment concerns in the case were "substantial," but he concluded

that, at least "at this early stage of the litigation," the defendant had not shown that the column was incapable of bearing a defamatory meaning. The judge stated:

Read in context, including the defendant's apparent prominence in the field[n4] and his official position at the time, this court believes . . . that the . . . Article can be read regarding the hostility to labor and that plaintiffs have acted irresponsibly and antagonistically regarding labor contrary to the public interest in public safety.

-----Footnotes-----

n4 According to his resume, "Mr. Wilner has an exceptional reputation for integrity and accuracy among CEOs, senior congressional staff, university professors, government transportation officials, media representatives, labor-union officers, transportation attorneys, academic economists and senior staff of public-policy think tanks."

-----End Footnotes-----

[**20]

[*588] And, that these statements in the Article would have the tendency, which is part of the standard at this stage, to injure plaintiffs in their trade, profession, or community standing. And, to lower them in the estimation of the community in which they sit, the railway transportation community.

D. Judge Huvelle's ruling.

Judge Canan's ruling having kept the case alive, the parties conducted discovery, and Wilner ultimately filed a second motion for summary judgment. On January 15, 1999, following extensive briefing and argument, Judge Huvelle delivered a comprehensive oral ruling in which she granted Wilner's renewed motion. Because we agree substantially with significant parts of Judge Huvelle's decision and place some reliance on her analysis in our disposition of the appeal, we set forth her oral opinion in some detail.

(1) First Amendment implications of the suit.

After briefly addressing a number of other matters, n5 Judge Huvelle focused upon the First Amendment aspects of the case. She emphasized, citing the Keogh decision, supra, 125 U.S. App. D.C. at 35, 365 F.2d at 968, that "the threat of being put to the defense of a lawsuit . . . [*21] may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." Agreeing with Judge Oberdorfer's comments in Novecon, Ltd. v. Bulgarian-American Enter. Fund, 977 F. Supp. 45, 47 (D.D.C. 1997), Judge Huvelle stated that " [HN4] summary procedures are particularly important to guarantee robust discussion of [matters of] public controversy and to protect media defendants from the threat of chilling freedom of the press and speech." Citing this court's decision in Myers, supra, 472 A.2d at 50, the judge emphasized that in the first instance it was the court, and not the jury, that must be vigilant against encroachments upon the free and unfettered exercise of First Amendment rights.

-----Footnotes-----

n5 Judge Huvelle ruled, inter alia, that Judge Canan's denial without prejudice of Wilner's first motion for summary judgment did not constitute the "law of the case" and did not require her to deny the motion. The judge relied on Bagley v. Foundation for Preservation of Historic Georgetown, Inc., 647 A.2d 1110, 1112-13 (D.C. 1994), in which this court affirmed the award of summary judgment by a second judge after the first judge had denied an earlier motion without prejudice. The judge also indicated that a genuine issue of fact was presented regarding whether Wilner acted with malice, and that summary judgment in Wilner's favor therefore could not properly be granted on the basis of lack of malice. Finally, Judge Huvelle stated that it was unnecessary to determine whether Guilford and the individual plaintiffs are public figures, but she expressed the view that all of them are.

-----End Footnotes-----

[**22]

After outlining the elements of an action for defamation, Judge Huvelle explained that [HN5] in order to constitute a libel, a statement must be capable of bearing a defamatory meaning and must be provably false. The judge characterized the question whether the requisite showing on these issues had been made as a "pure question of law," and she "[did] not think that [she] could decide these questions by reference to the affidavits of Mr. Northrup or Mr. Kittredge." She noted, however, that the court must examine a challenged writing in the "entire context in which it was published." The judge stated:

The context here I think is somewhat clear and undisputed. [Moldea II] stresses, even after Milkovich, the importance of context, because it is in part the setting of the speech in question that makes [its] hyperbolic nature apparent and which helps determine the way in which the intended audience will receive [it].

Here we know that this article was prepared in response to the announcement of a private company, Guilford, of [its] plan to buy Amtrak's northeast corridor. The article appeared in a trade journal on an opinion page. It relates [*589] undisputably to a matter of public[*23] concern.

Acknowledging the teaching of Milkovich, supra, 497 U.S. at 18-19, the judge stated that [HN6] there is "no wholesale definitive exemption for anything that might be labeled opinion, because to have such an exemption for opinion would ignore the fact that expressions of opinion may imply an assertion [of verifiably false] objective fact." Relying on *Washington v. Smith*, 317 U.S. App. D.C. 79, 80, 80 F.3d 555, 556 (1996), however, the judge stated that [HN7] "a statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore objectively verifiable." Paraphrasing Milkovich, supra, 497 U.S. at 20, the judge opined that [HN8] "the First Amendment protects statements of imaginative expression and rhetorical hyperbole in order to assure that the public debate will not suffer for lack of these statements, which have traditionally added much to the discourse of our nation." The judge relied on the Supreme Court's holding in *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282-87, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), that epithets such as "scab" and "traitor," when used in a union publication, were not actionable.[*24] She also cited *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 11-15, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), in which the Court held that the use of the word "blackmail" was not libelous when the context made it clear that the accusation was hyperbolic and that the plaintiff was not actually being accused of a crime. Concluding her summary of the applicable legal principles, the judge stated:

We also know from *Moldea II* . . . that where challenged material addresses a public controversy such as [the] one that we have here, the First Amendment provides breathing space for journalists to criticize and interpret the actions and decisions of those involved. [HN9] Where a journalist is interpreting facts and information, he cannot be held liable for defamation unless no reasonable person could find that the interpretation was supported by the underlying facts.

(2) The claim that Wilner accused the plaintiffs of general hostility to labor.

Judge Huvelle then turned to what she called "the gist of the action," namely, the allegation that Wilner had characterized Guilford as "unfair, hostile, [and] antagonistic to labor." Although Wilner did not explicitly [*25] describe the plaintiffs in this manner, the judge assumed, for purposes of her decision, that the language of the column "could be reasonably capable of this defamatory interpretation." The judge concluded, however, that even if the allegation of anti-labor bias was fairly implied in the column, that charge "is not provably false. It is much more of a subjective assessment of a company's attitude and conduct towards labor." n6 Relying on *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 143 P.2d 20, 23 (Cal. 1943), Judge Huvelle stated that "the preponderance of judicial decisions supports the rule that the use of the word 'unfair' in connection with labor controversies does not impute want of moral integrity or business capacity but merely is a characterization of an employer who refuses to conduct his business in the manner desired by the union." The judge cited a number of additional authorities to the same general effect, including *Montgomery Ward & Co. v. McGraw-Hill Pub. Co.*, 146 F.2d 171 (7th Cir. 1944), n7 and *Gregory v. McDonnell* [*590] *Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 428, 131 Cal. Rptr. 641 (Cal. 1976).[*26]

-----Footnotes-----

n6 The judge cited Justice Frankfurter's observation for the Court in *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 295, 88 L. Ed. 58, 64 S. Ct. 126 (1943), that "to use loose language or undefined slogans that

are part of the conventional give-and-take in our economic and political controversies - like 'unfair' or 'fascist' - is not to falsify facts."

n7 In *Montgomery Ward*, an employer claimed that an article in *Business Week* discussing the employer's labor policies, which were alleged in the article to include an unrelenting refusal to make any concessions to unions, implied that the employer had violated the National Labor Relations Act [NLRA] by failing to bargain in good faith and that the employer was hostile to labor. The court stated, inter alia, that even if the article was capable of being construed as charging that the plaintiff was unfair to labor, this would not make the article libelous per se. 146 F.2d at 176. Judge Huvelle relied upon and quoted from this passage.

-----End Footnotes-----
 [**27]

The plaintiffs argued that, with the exception of the *Montgomery Ward* case, the cited authorities were distinguishable upon the common ground that they all involved litigation between parties to a labor dispute. Relying on *Myers* and *Gregory*, Judge Huvelle emphatically rejected this contention:

... This is no reason not to apply these cases, even though this is not a per se labor dispute, it is an issue of public dispute or controversy, and the holdings of these cases have just as much applicability to a commentator in the labor field as to a union involved in a labor dispute.

[It] seems to this court that the author must be given the same freedom to express an opinion as a labor union, and that this is the heart of providing First Amendment protection to a person, to promote - to enable him to promote public debate. Mere criticism does not constitute defamation, obviously. The First Amendment was designed to protect articles such as this one, that serve to promote debate in a free society. n8

-----Footnotes-----

n8 Judge Huvelle also addressed briefly two other claims by the plaintiffs which were closely related to their allegation that Wilner had falsely described them as hostile to labor. According to the plaintiffs, Wilner had alleged in the column that Guilford had caused strikes and work stoppages and that Guilford had used the Springfield Terminal arrangement as a means to avoid its responsibilities under existing collective bargaining agreements and to compel its employees to accept lower wages and less favorable working conditions. In the judge's view, these portions of the article, like the general allegation of hostility to labor, were not capable of bearing a defamatory meaning. The judge was also of the opinion that, with respect to the plaintiffs' interpretation of the discussion in the article of the Springfield Terminal matter, that "this is not what the article says, either explicitly or implicitly."

-----End Footnotes-----
 [**28]

(3) The claim that Wilner accused the plaintiffs of violating the RLA.

Judge Huvelle also addressed the plaintiffs' related claim that "the article is defamatory insofar as it charges them with failure to comply with the [RLA and] also with acting inconsistently with standard and sound labor management relations, not being a reliable freight railroad." The judge observed that "this is not what the article says," that "there is no mention of the [RLA]," and that "there's no discussion of what would constitute standard and sound labor management relations." n9 According to the judge, "the kinds of implications that [the plaintiffs argue] here . . . would amount to enlarging the sense of the published words." Perceiving "no basis upon which to find [that] defendant intended or endorsed the defamatory inference suggested by the plaintiffs," the judge stated, citing *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988), that "one cannot require a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication, for this would . . . undermine the uninhibited, open discussion of matters of public concern. [**29]"

-----Footnotes-----

n9 Judge Huvelle rejected the plaintiffs' contention that their case was made more persuasive by perceived differences between an employer's obligations under the RLA and his or her responsibilities under the National Labor Relations Act (NLRA). The judge stated that both statutes "require good faith bargaining," and that both impose a duty to make every effort to make and maintain labor agreements and avoid interruptions of service. In the judge's view, any differences between the two statutes could not "change the balance under the First Amendment."

-----End Footnotes-----

The judge also expressed the view that even if there was some suggestion in the [*591] column that Guilford was an unreliable freight railroad and did not follow sound labor policies and practices, Wilner still would not be liable for defamation. As the judge saw it, the reader would understand that these perceived suggestions "represent the writer's interpretation of the facts presented, because the reader is free to draw his or her own conclusions based on these facts. [**30]" The judge, citing *Moldea II*, supra, 306 U.S. App. D.C. at 8, 22 F.3d at 313, stated that, under these circumstances, the statements were not actionable in defamation. The judge described the uncontested facts:

Here, it's undisputed and the article reveals that this was a strike by the Brotherhood of Maintenance of Way Employees and a work stoppage by the employees at the Springfield Terminal. We also know that Guilford leased the operating rights of the B&M and MEC to the Springfield Terminal which caused all employees to be covered by a union agreement which the UTU had negotiated with Springfield Terminal.

We know that arbitrations with labor occurred and Amtrak did condemn a section of the track owned by the B&M. These events are not disputed. So given that these facts are true and they were presented in the context of the column, a reader would understand that such supported opinion represented Mr. Wilner's interpretation of the facts presented. Since the reader is free to draw his or her own conclusions whether plaintiffs acted inconsistently with sound and standard labor relations, this implication is not actionable in defamation.

As required by [*Washington v. Smith*, supra, 317 U.S. App. D.C. at 81, 80 F.3d at 557], [**31] in cases involving opinion on matters of public concern, the writer is immune from defamation action unless plaintiff can show that the statement is so obviously false that no reasonable person could find that the review's characterizations were supportable interpretations of the underlying facts.

Even assuming, as plaintiff argues that there [are] facts that are inaccurately stated here, the gist of the facts mean that they cannot sustain their burden under [*Moldea II*].

(4) Claims that Mellon and Fink were personally defamed.

The judge also addressed the individual plaintiffs' claim that "it is defamatory to say [that] Mr. Mellon and Fink are eccentric and strange." The judge pointed out that the article does not say this. It calls them reclusive and antiestablishment. In this court's view they are not synonymous. . . .

[HN10] The court also finds that it is not defamatory to call someone . . . reclusive, strange or eccentric or antiestablishment. Allegedly defamatory remarks must be more than unpleasant or offensive. The language must make the plaintiff appear odious, infamous or ridiculous.

The judge added that "what we have here is interpretive expression or subjective [**32] impression; it's a characterization of someone's personality." Further, quoting from *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 350, 838 F.2d 1287, 1300, cert. denied, 488 U.S. 825, 102 L. Ed. 2d 51, 109 S. Ct. 75 (1988), she stated that "evaluative statements of taste and belief can never provide the basis for a defamation suit because such statements are incapable of being proved false."

II.

LEGAL DISCUSSION

A. Standard of Review.

[HN11] "Whether summary judgment was properly granted is [a question] of law, and we review de novo a decision granting such relief." *Abdullah v. Roach*, 668 A.2d 801, 804 (D.C. 1995). Our en banc court has stated:

[HN12] [*592] In order to be entitled to summary judgment [the moving party] must demonstrate that there is no genuine issue of material fact and that [it is] entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *Clyburn v. 1411 K Street Ltd. Partnership*, 628 A.2d 1015, 1017 (D.C. 1993). The record is viewed in the light most favorable to the party opposing the motion. *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991).[*33] [HN13] On appeal, we must assess the record independently, but the substantive standard applied is the same as that utilized by the trial court. *Northbrook Ins. Co. v. United Servs. Auto Ass'n*, 626 A.2d 915, 917 (D.C. 1993).

Colbert v. Georgetown Univ., 641 A.2d 469, 472 (D.C. 1994) (en banc). [HN14] On summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Indeed, while the moving party's papers must be "closely scrutinized," the opponent's materials are to be treated "indulgently." *Fry v. Diamond Constr., Inc.*, 659 A.2d 241, 246 (D.C. 1995).

But this case implicates serious First Amendment concerns, and to prolong this litigation may inhibit protected speech. We must therefore remain mindful of our obligation as [HN15] an appellate court, in a case raising First Amendment issues, "to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Milkovich*, supra, 497 U.S. at 17[*34] (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)) (internal quotation marks omitted). "The threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Myers*, supra, 472 A.2d at 50. "Because of the compelling First Amendment interest at stake, we regard summary judgment as a useful method of disposing of constitutional libel actions where appropriate." *Nader v. Toledano*, 408 A.2d 31, 44 (D.C. 1979), cert. denied, 444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980).

In *Keogh*, supra, 125 U.S. App. D.C. at 35, 365 F.2d at 968, the court, after recognizing the importance of summary judgment as a means of avoiding long and expensive litigation and of preventing the harassment and coercion of non-affluent parties, stated that in the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the [*New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)][*35] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.[n10]

-----Footnotes-----

n10 There is nothing in the record to show that the plaintiffs, who are not public officials, are either popular or unpopular. There is likewise no evidence regarding the unpopularity vel non of Wilner's "cause," if indeed he has one. Nevertheless, the reasoning of *Keogh* can fairly be applied to this case. We note that the plaintiffs elected to sue only Wilner, an individual who might be expected to have limited resources, and that they did not include the Journal of Commerce as a defendant.

-----End Footnotes-----

[**36]

Our obligation to protect the right of the citizen to free expression requires us to include these considerations in the summary judgment calculus.

[*593] B. Law of the case.

The plaintiffs claim that Judge Huvelle violated the principle of "the law of the case" by declining to follow Judge Canan's earlier ruling denying Wilner's motion for summary judgment. Inviting us to examine a tabular comparison, set forth in the appendix to their brief, of Wilner's first and second motions, they argue that the two submissions are substantially identical, that Judge Huvelle did not consider any materials not previously presented to Judge Canan, that the decisions of the two judges are irreconcilable, and that Judge Huvelle erred by declining to follow Judge Canan's ruling. Wilner responds that Judge Canan explicitly made the denial of Wilner's first request for summary judgment without prejudice, that discovery was conducted between the two motions, and that the law of the case doctrine therefore is not implicated.

In our view, Judge Canan's use of the phrase "without prejudice," while obviously significant, is not necessarily dispositive of the plaintiffs' "law of the case" claim. If[*37] the two judges considered the same facts and legal principles and reached diametrically opposite conclusions, then it would surely exalt form over substance to attach decisive significance to the two words in question. A reasonable construction of Judge Canan's intent in making his ruling "without prejudice" is that the judge did not mean to foreclose a different result if relevant new facts were established during discovery, or if the law changed. His order should not be read as meaning "without prejudice to another trial judge's overruling me if he or she believes that I was wrong."

In this case, the record relied on by Judge Huvelle differed at least slightly from the record available to Judge Canan, for Judge Huvelle made an explicit reference to Wilner's deposition in one part of her oral decision. The judge's citation to Wilner's testimony did not, however, appear to be crucial to her disposition. Indeed, in granting summary judgment, Judge Huvelle focused almost exclusively on the text of Wilner's column, to the exclusion of other materials. But even assuming, without deciding, that the two motions are sufficiently similar to one another to implicate law-of-the-case considerations, [*38] reversal is not warranted where, as here, the appellate court agrees on the merits with the second judge's analysis.

As Justice Holmes wrote for the Court in *Messinger v. Anderson*, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912), [HN16] the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." The courts have thus held that "denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge." 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4478, at 794 (1981 & Supp. 2000) (footnote omitted). Although mutual respect between members of the same court, and consistency in their rulings, are no doubt desirable, "judicial sensibilities should play no part in the disposition of suitors' rights." *Dictograph Prods. Co. v. Sonotone Corp.*, 230 F.2d 131, 135 (2d Cir. 1956) (Learned Hand, J.). "Obviously we cannot be expected to reverse a correct decision by one [trial] judge simply because we find that it is contrary to a prior ruling by another [trial] judge in the same case, i.e., contrary[*39] to the law of the case." *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 797 (7th Cir.), cert. denied, 368 U.S. 944, 7 L. Ed. 2d 340, 82 S. Ct. 376 (1961). We therefore agree with the Supreme Court of Connecticut that in an appeal to this court where views of the law expressed by a judge at one stage of the proceedings differ from those of another at a different stage, the important question is not whether there was a difference but which view was right.

Barnes v. Schlein, 192 Conn. 732, 473 A.2d 1221, 1222 (Conn. 1984) (citations and internal [*594] quotation marks omitted). If Judge Huvelle's disposition of Wilner's motion was correct on the merits - and we are satisfied that it was - we are required to affirm her ruling, see *Parmelee Transp. Co.*, supra, 292 F.2d at 797, regardless of whether or not the judge adhered to the law of the case.

C. The merits.

(1) Reputational interests and the First Amendment.

[HN17] In the District of Columbia, "a statement is defamatory "if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." Best, [*40] supra, 484 A.2d at 989. But not every uncomplimentary publication is libelous. "An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous or ridiculous.'" Id. (quoting *Johnson v. Johnson Pub. Co.*, 271 A.2d 696, 697 (D.C. 1970)).

[HN18] Defamation is . . . that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It necessarily, however, involves the idea of disgrace; and while a statement that a person is a Republican may very possibly arouse adverse feelings against him in the minds of many Democrats, and even diminish him in their esteem, it cannot be found in itself to be defamatory, since no reasonable person could consider that it reflects upon his character.

W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 111, at 773-74 (5th ed. 1984) (emphasis added) (footnotes omitted). [HN19] Words which do not disparage a plaintiff's character are not actionable, even if special damages flow from their publication. *Knight v. Blackford*, 3 Mackey (14 D.C.) 177, 182-83 (Supreme Ct. D.C. 1877).[**41]

[HN20] "[A] publication may convey a defamatory meaning if it 'tends to lower the plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or [of the] plaintiff's associates.'" *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 279, 909 F.2d 512, 518 (1990) (quoting *Afro-American Publ'g Co. v. Jaffe*, 125 U.S. App. D.C. 70, 75 n.10, 366 F.2d 649, 654 n.10 (1966)). If the publication "obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of majority vote." *Peck v. Tribune Co.*, 214 U.S. 185, 190, 53 L. Ed. 960, 29 S. Ct. 554 (1909) (opinion by Holmes, J.). If Wilner's column defamed the plaintiffs in the eyes of persons connected with the railroad industry, then it is unnecessary for the plaintiffs to show that their reputations were unfavorably affected among the members of the public at large.

[HN21] The trial court's threshold task in an action for defamation is to determine whether the challenged statement is "capable of bearing a particular meaning," and "whether that meaning is defamatory." RESTATEMENT[**42] (SECOND) OF TORTS § 614 (1) (1977).

[HN22] It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule, as a matter of law, that it was not libelous.

Levy v. American Mut. Ins. Co., 196 A.2d 475, 476 (D.C. 1964) (footnote omitted). The court should not, however, indulge far-fetched interpretations of the challenged publication. The statements at issue should not be "interpreted by extremes, but should be construed as the average or common mind would naturally understand [them]." 8 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 29:37 (1991) (hereinafter SPEISER, KRAUSE & GANS). If the court determines that a statement is indeed capable of bearing a defamatory meaning, then whether that [*595] statement is in fact "defamatory and false [is a question] of fact to be resolved by the jury." *Id.*; RESTATEMENT (SECOND) OF TORTS, supra, § 614 (1).

As both Judge Canan and Judge Huvelle recognized, modern defamation law also implicates constitutional principles. Thirty-six years ago, the Supreme Court held, for the first time, that[**43] [HN23] the First Amendment to the United States Constitution may constrain the application of state defamation law, for "libel can claim no talismanic immunity from constitutional limitations." *New York Times v. Sullivan*, supra, 376 U.S. at 269. This is so because "whatever is added to the field of libel is taken from the field of free debate." 376 U.S. at 272 (citing *JOHN STUART MILL, ON LIBERTY* 15 (Oxford Blackwell ed. 1947)). n11 "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." 376 U.S. at 279 n.19 (quoting *ON LIBERTY*, supra, at 15) (internal quotation marks omitted).

-----Footnotes-----

n11 Mill's famous work was first published in 1859.

-----End Footnotes-----

Since *New York Times v. Sullivan*, the Court has made several attempts to balance the reputational interests protected by the common law of defamation with the guarantee of free speech that forms[**44] the constitutional and philosophic bedrock of our Republic. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 41 L. Ed. 2d 789, 94 S. Ct. 2997

(1974) (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777-78, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (holding that "the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern," and stating that "the First Amendment requires that we protect some falsehood in order to protect speech that matters") (quoting *Gertz*, supra, 418 U.S. at 341)). But striking an appropriate balance is not easy, for the competing interests are substantial. Children suspect, and adults know, that there is little truth to the adage that "sticks and stones may break my bones but words will never hurt me." "A defamatory statement may destroy an individual's livelihood, wreck his standing in his community, [**45] and seriously impair his sense of dignity and self esteem." *Ollman*, supra, 242 U.S. App. D.C. at 305, 750 F.2d at 974. Even Shakespeare's quintessential villain, Iago, spoke the literal truth when, with malice in his heart and treachery on his mind, he addressed his Commanding General:

Good name in man and woman, dear my lord,

Is the immediate jewel of their souls.

WILLIAM SHAKESPEARE, *OTHELLO*, Act III, scene 3 (quoted in *Milkovich*, supra, 497 U.S. 1 at 12, 110 S. Ct. 2695, 111 L. Ed. 2d 1). n12 The plaintiffs in this case assert that Wilner has damaged their business and sullied their collective good name.

-----Footnotes-----

n12 Iago went on to declaim that he "who steals my purse steals trash," but that "he that filches from me my good name . . . makes me poor indeed." *Id.*

-----End Footnotes-----

[HN24] Imposition of liability upon an individual on the basis of his words, on the other hand, threatens to inhibit speech and to undermine the core values of a free society. "The free flow of ideas and opinions is integral to our democratic form of government. [**46]" *Ollman*, supra, 242 U.S. App. D.C. at 305, 750 F.2d at 974. The "central commitment of the First Amendment . . . is that debate on public issues should be uninhibited, robust and wide open." *Bond v. Floyd*, 385 U.S. 116, 136, 17 L. Ed. 2d 235, 87 S. Ct. 339 (1966). More than two centuries ago, the French philosopher, Voltaire, anticipatorily articulated the spirit of our [**596] First Amendment when he wrote to Helvetius that "I disapprove of what you say, but I will defend to the death your right to say it." That right is surely at its zenith when it is exercised in an Op-Ed column on a subject of general public interest. Cf. *Moldea II*, supra, 306 U.S. App. D.C. at , 22 F.3d at 315.

In this case, balancing of the plaintiffs' reputational interests against Wilner's right to free expression is complicated by the fact that much of what is alleged to be defamatory in Wilner's column is not expressly stated. Defamation by implication, an area of law "fraught with subtle complexities," *White*, supra, 285 U.S. App. D.C. at 279, 909 F.2d at 518, requires careful exegesis to ensure that imagined slights do not[**47] become the basis for costly litigation.

[HN25] Because the Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.

Chapin v. Knight-Ridder, 993 F.2d 1087, 1092-93 (4th Cir. 1993); *White*, supra, 285 U.S. App. D.C. at 279, 909 F.2d at 520; *Dodds v. American Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998) (holding that plaintiff in defamation-by-implication case must show that the defendant intended to convey the defamatory impression); *Howard v. Antilla*, 191 F.R.D. 39, 44 (D.N.H. 1999) (same); *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 197 Mich. App. 48, 495 N.W.2d 392, 395-96 (Mich. Ct. App. 1992) (same); see also, *Moore v. Sun Publ'g Corp.*, 118 N.M. 375, 881 P.2d 735, 741-42 (N.M. Ct. App. 1994) (applying heightened standard for defamation by implication although the plaintiff was not a public figure and the[**48] subject matter of the suit was not of general public interest).

Moreover, the substance of Wilner's column was fairly characterized by Judge Huvelle as "opinion." Prior to the Supreme Court's decision in *Milkovich*, statements classified as "opinion" were generally viewed as non-defamatory. In *Gertz*, supra, 418 U.S. at 339-40, the Court stated that under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

"[A] majority of the federal . . . courts of appeal . . . interpreted the *Gertz* dictum to mean that statements of fact can be actionable defamation [but that] statements of opinion cannot." *Sigal Const. Co. v. Stanbury*, 586 A.2d 1204, 1209 (D.C. 1991); but cf. *Myers*, supra, 472 A.2d at 47 (holding that "expressions of opinion are entitled to constitutional protection unless they imply the existence of undisclosed defamatory facts as the basis of the opinion").

In 1989, in *Milkovich*, the Supreme Court rejected any per se rule providing blanket[**49] First Amendment protection for all statements of opinion:

We do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." . . . Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

497 U.S. at 18. The Court reasoned that no such absolute exemption for opinion was necessary, for the "vital guarantee of free and uninhibited discussion of public issues" was adequately protected by the Court's existing First Amendment jurisprudence. *Milkovich*, 497 U.S. at 22. The Court noted that [HN26] liability under state defamation law for a statement on a matter of public concern may be imposed only if the statement is provably false, *Milkovich*, 497 U.S. at 19-20, citing *Hepps*, supra, 475 U.S. at 776-77; that "imaginative expression" [*597] and "rhetorical hyperbole" are not actionable in defamation because they "cannot reasonably be interpreted as stating actual facts about an individual," 497 U.S. at 20, quoting *Falwell*, supra, 485 [*50] U.S. at 50, 53-55; and that [HN27] a public figure may recover in defamation only if the challenged defamatory statements were "made with knowledge of their false implications or with reckless disregard of their truth." *Id.*

Thus, although *Milkovich* has foreclosed any contention that there exists a blanket immunity for opinion, the Supreme Court took pains to ensure that constitutional restraints on the reach of state defamation law would remain in place so that protected speech would not be inhibited. [HN28] Under *Milkovich*, "statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Moldea II*, supra, 306 U.S. App. D.C. at 10, 22 F.3d at 313. "But if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

[HN29] "[A] statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore objectively verifiable." *Washington v. Smith*, supra, 317 U.S. App. D.C. at 80, 80 F.3d at 556[**51] (citation and internal quotation marks omitted). "Assertions of opinion on a matter of public concern receive full constitutional protection if they do not contain a provably false factual connotation." *Id.* (citation and ellipsis omitted). Finally, "*Milkovich* did not disavow the importance of context," *Moldea II*, supra, 306 U.S. App. D.C. at 5, 22 F.3d at 314; see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511-13, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991), and it therefore remains critical to our inquiry that the allegedly defamatory utterances in this case appeared in an Op-Ed column in which Wilner was commenting on matters of substantial public concern.

We [HN30] summarize. In order to sustain an action for defamation against Wilner, the plaintiffs must show both that his column was capable of bearing a defamatory meaning and that it contained or implied provably false statements of fact. On appeal from an order granting summary judgment, the question is whether an impartial jury could reasonably so find.

(2) The perceived imputation of hostility to labor.

Substantially for the reasons stated by Judge Huvelle, [**52] we are unpersuaded by the plaintiffs' principal contention, namely, that Wilner defamed them by characterizing them as antagonistic to labor. n13 As Judge Huvelle

noted, a majority of courts have held that the characterization of an employer as "unfair" during the course of a labor dispute is not libelous. We agree with these authorities. In Gregory, supra, 552 P.2d at 425, the Supreme Court of California stated that statements made in the context of a labor dispute which on their face resemble statements of fact, may, depending on the circumstances, be treated as statements of opinion not subject to an action for libel. In Emde v. San Joaquin County etc. Council, supra, . . . [*598] 143 P.2d [at] 20, we expressed the principle that ". . . since such [labor] disputes, realistically considered, normally involve considerable differences of opinion and vehement adherence to one side or the other, a necessarily broad area of discussion without civil responsibility in damages is an indispensable concomitant of the controversy." . . . (143 P.2d [at] 26). Thus, we characterized as opinion, statements by a union that an employer[**53] had "hired" nonunion workers and put them on a "straight commission plan," that certain guarantees gained by the union had been "wiped out," that the status of employees "remained unchanged," and that the employer's labor policy was "destructive." n14

-----Footnotes-----

n13 We include within the rubric of hostility to labor the claim that Wilner accused the plaintiffs of causing strikes and work stoppages. [HN31]

A statement or implication that an employer is "hostile" or "antagonistic" to labor, which focuses on his presumed state of mind or which draws inferences regarding that state of mind from his conduct, differs in significant respects from an allegation that the employer has violated a statute which protects the rights of his employees. We deal with the second type of allegation in Part II C (3), infra.

n14 The Gregory opinion was, of course, written thirteen years before the Supreme Court's decision in Milkovich, in which the Court rejected any blanket protection for "opinion." We are confident, however, that if Gregory had been decided after Milkovich, the Supreme Court of California would have reached the same result, and would have ruled that the statements at issue were neither defamatory or provably false.

-----End Footnotes-----

[**54]

We also agree with Judge Huvelle's view that, insofar as allegations of hostility to labor are concerned, the author of an Op-Ed column is entitled to protection at least as great as that which is provided to the employee with the denunciatory picket sign. In the Montgomery Ward case, supra, which involved a column in Business Week, the court concluded that a charge of being unfair to labor was not libelous. The court stated:

If it were libelous simply to say of another that he is unfair to labor, every picketer who carries a banner with such a legend would be guilty of libel. To say that one is unfair to labor is not a statement of fact, but of an opinion. Likewise to say of one: you are reactionary, you are undemocratic, you are a nationalist, you are an isolationist, you are a New Dealer, you are a Union Leaguer, you are opposed to labor, you are a coddler of labor, is similarly to express an opinion. Calling one unfair to labor is no different. All of these expressions spring from controversies on questions of public interest. "But written abuse relating solely to political views or arguments on questions of public interest, and which do not attack the character of[**55] a person, nor impute immorality, nor violation of law,[n15] are not actionable per se." Newell on Libel and Slander, 4th Ed. p. 57.

-----Footnotes-----

n15 We address, infra, in Part II C (3), the question whether Wilner defamed the plaintiffs by allegedly charging them with violations of the RLA.

-----End Footnotes-----

146 F.2d at 176. n16

-----Footnotes-----

n16 In *Montgomery Ward*, the Court of Appeals also expressly declined to follow *Consolidated Terminal Corp. v. Drivers, Chauffeurs and Helpers Local Union No. 639*, 33 F. Supp. 645, 650 (D.D.C. 1940), in which a United States District Court had reached a contrary conclusion. Like Judge Huvelle, we find *Montgomery Ward* more persuasive than *Consolidated Terminal*.

The *Montgomery Ward* decision is distinguishable from the present case in that the issue there was whether the article was libelous per se, whereas the plaintiffs here do not rest their case on a libel per se, theory. On the contrary, Guilford claims that it suffered special damages as a consequence of Wilner's article. Nevertheless, the passage from *Montgomery Ward* that we have quoted in the text illuminates the issue before us, especially in view of case authority holding that a publication is libelous only if the plaintiff is made to appear "odious, infamous or ridiculous." *Best*, supra, 484 A.2d at 989.

-----End Footnotes-----

[**56]

Moreover, we do not believe that those statements in the column which the plaintiffs have characterized as "provably false" are of the genre which would support a defamation case against the author of a column on the opinion page of a newspaper. The plaintiffs' focus has been on Wilner's allegation that Guilford "bolted" from national wage and benefit negotiations. According to Professor Northrup, Guilford did not bolt; rather, it declined to "opt into" national "handling." Either way, Guilford negotiated locally and not nationally. Even assuming that Wilner's [*599] use of the verb "bolted" reflects lack of precision, and treats the plaintiffs with undeserved asperity, the challenged language surely pales in comparison to "blackmail," *Greenbelt Publ'g Ass'n*, supra, 398 U.S. at 11-14, or "traitor" or "scab," *Austin*, supra, 418 U.S. at 282-87. If we were to adopt a rule of law which sustains the plaintiffs' position on this issue, then authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the[**57] robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered.

Partington, supra, 56 F.3d at 1154.

Speaking through Professor Northrup, the plaintiffs also insist that the Springfield Terminal leases "had a transportation purpose and the ICC so found," and that Guilford's employees did not suffer a reduction in compensation or a loss of seniority. But Wilner acknowledged in his column that the ICC "sanctioned the lease agreement and referred certain labor issues to arbitration." In other words, he informed the reader that Guilford's actions had been upheld by a federal agency. To be sure, Wilner described the ICC as having a "zealous pro-management bias in those days," but he was surely within his rights in disagreeing with and criticizing the Commission. Any reasonable reader of the column would understand that Guilford took certain actions, that Wilner was apparently unenthusiastic about those actions, and that the ICC basically sustained them. This is not the stuff of which successful libel suits are made. n17

-----Footnotes-----

n17 According to the plaintiffs and Professor Northrup, it is provable that contrary to the implications in Wilner's column, "the 1986 strike did not arise from Guilford's attempts to obtain concessions from labor." This contention is unpersuasive. In *Railway Labor Executives' Ass'n v. United States*, 300 U.S. App. D.C. 142, 144, 987 F.2d 806, 808 (1993) (per curiam), the court stated that the Springfield Terminal transactions were of great concern to rail labor, for they would make ST [Springfield Terminal] the de facto operator of the entire GTI system and subject the labor forces of the other subsidiaries to ST's less favorable rates of pay, rules, and working conditions.

(Emphasis added.) The court also noted that, according to the employees, the strike "was motivated by legitimate safety concerns." A federal Public Labor Board held that the work stoppage was legally permissible and that "[Guilford's]

policy of treating striking employees as having resigned was impermissible discrimination." See *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 335-36 (D.Me. 1991). In light of these comments by judicial and administrative bodies, Wilner's observations were not provably false.

-----End Footnotes-----

[**58]

Finally, whether or not any of the remaining statements challenged by Professor Northrup are in fact inaccurate, n18 Wilner's basic theme is not provably false. Whether the plaintiffs are hostile to labor is not an issue of fact susceptible of objective proof. [HN32] "It is the defamatory implication - not the underlying assertions giving rise to the implication - which must be examined to discern whether the statements are entitled to full constitutional protection." White, *supra*, 285 U.S. App. D.C. at 284, 909 F.2d at 523 (emphasis in original). "In determining the gist or sting of a newspaper article to assess whether it is actionable, a court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance." Partington, *supra*, 56 F.3d at 1161 (emphasis in original; citation and internal brackets and quotation marks omitted). Any inaccuracies in Wilner's column regarding Guilford's attitude vis-a-vis [*600] labor do not give rise to liability for defamation.

-----Footnotes-----

n18 Northrup claims, for example, that the 1986 strike on the Maine Central did not "quickly" follow Guilford's acquisition of that railroad. Assuming that Northrup is right, the authorities cited in the text establish that this kind of inaccuracy is insufficient to establish liability.

-----End Footnotes-----

[**59]

(3) The alleged accusation that the plaintiffs violated the Railway Labor Act .

The plaintiffs' claim that Wilner accused them of violating the RLA, while closely related to the broader issue of hostility to labor, stands on a somewhat different legal footing. "To charge one with being unfair to labor is a much broader charge than to charge one with unfair labor practices." *Montgomery Ward*, *supra*, 146 F.2d at 176. A narrower and more specific charge, focused on allegedly unlawful conduct, is more readily susceptible of a defamatory meaning than is the mere attribution of a hostile state of mind. In *Montgomery Ward*, for example, the court recognized that to accuse an employer falsely of violations of a state safety statute is libelous per se. *Montgomery Ward*, 146 F.2d at 177 (citations omitted). [HN33] "To constitute a libel it is enough that the defamatory utterance imputes any misconduct whatever in the conduct of the [plaintiff's] calling." *RESTATEMENT (SECOND) OF TORTS* § 569, cmt. (e) (1977). Violation of the RLA might reasonably be viewed as "misconduct," and we shall assume for purposes of this opinion that a provably false accusation of such conduct may be defamatory. n19

-----Footnotes-----

n19 The RLA also provides for criminal penalties for certain violations. See 45 U.S.C. § 152 (Tenth). [HN34] "It is a well settled general rule, supported by both modern and older cases, both British and American, that a publication . . . that charges the present plaintiff with a crime or criminal conduct or activity . . . is libelous per se." 8 *SPEISER, KRAUSE AND GANS*, *supra*, § 29.59 (footnote omitted). None of the prohibitions which carry criminal penalties, however, is even remotely applicable to the issues in this case.

-----End Footnotes-----

[**60] [HN35]

The RLA provides, in pertinent part, as follows:

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 (First). The gist of the plaintiffs' position on this aspect of the case appears to be that Wilner has falsely accused them of not carrying out their responsibilities as set forth in the quoted language. We do not agree.

In *Montgomery Ward*, supra, it was alleged in the *Business Week* article, inter alia, that the employer's labor policy was "anathema" to the United States Conciliation Service (USCS) and to the CIO; that the employer had refused to meet with the USCS and the union, had "brushed off" the union, and had given the USCS the "run-around"; and[**61] that the employer had said "no" to every request made by the union. The employer claimed that these and other allegations in the article were intended to mean, and were understood by readers to mean, that the employer had refused to bargain collectively with the duly chosen representatives of its employees, in violation of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. The court held, to the contrary, that *Business Week* had not accused the employer of any unlawful conduct, and that "the alleged libelous words cannot reasonably be said to charge the plaintiff either with violation of the National Labor Relations Act or with being unfair to labor." *Montgomery Ward*, supra, 146 F.2d at 175.

In the present case, as the trial judge pointed out, the RLA is not mentioned in Wilner's column at all. Guilford's obligations under that statute likewise are not addressed. We know of no provision of the RLA requiring Guilford to participate in national rather than local negotiations, and Wilner's column certainly does not [*601] provide the reader with any reason to believe that "not opting" into national negotiations is unlawful. In addition, for the reasons[**62] previously stated, we do not believe that use of the word "bolted" alters the result. Similarly, the RLA does not require employers to accede to union proposals or to refrain from litigating legal issues before agencies and courts. To the extent that there is any discussion in the column of the legality or lack thereof of Guilford's various actions, Wilner discloses that the ICC ruled in Guilford's favor on some issues and that Guilford had engaged in contested litigation with the union and with Amtrak. Judge Huvelle correctly pointed out that, notwithstanding any claimed inaccuracies as to dates and the like, the critical historical facts are undisputed, and the reader is therefore free to draw his or her own conclusions regarding whether the plaintiffs acted wrongfully.

The column may perhaps be read as indicating that Wilner is sympathetic to the union's point of view rather than to Guilford's, but that surely does not render the column defamatory. The reader might fairly infer from the column that Guilford bargains "tough," that it selects the forum that it deems most favorable (e.g., local rather than national negotiations), and that it litigates vigorously in support of[**63] its position, sometimes successfully, sometimes not. Such a posture roughly parallels the conduct attributed by *Business Week* to the employer in *Montgomery Ward*, and we conclude that here, as in that case, no violation of the statute has been alleged or implied.

Under these circumstances, the plaintiffs have not satisfied the rigorous standards which the courts have applied to claims of libel by implication. See *Washington*, supra, 317 U.S. App. D.C. at 81, 80 F.3d at 557; *White*, supra, 285 U.S. App. D.C. at 279, 909 F.2d at 518; *Chapin*, supra, 993 F.2d at 1093. [HN36] "Nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the published article itself." *Tavoulareas v. Piro*, 260 U.S. App. D.C. 39, 58, 817 F.2d 762, 781 (footnote omitted), cert. denied, 484 U.S. 870, 98 L. Ed. 2d 151, 108 S. Ct. 200 (1987). It is not impossible that some readers would read the column as suggesting what the plaintiffs say that it suggests, but to hold Wilner responsible for every inference a reader might reasonably draw from his article[**64] would undermine the uninhibited discussion of matters of public concern. *Saenz*, supra, 841 F.2d at 1318.

We are not unmindful of the plaintiffs' contention that materials presented by them in opposition to Wilner's motion for summary judgment present genuine issues of material fact. According to Professor Northrup, "any reader familiar with the railroad industry would conclude from reading [Wilner's column] that the plaintiffs . . . have violated their duties under the RLA" On the surface, this assertion, if accepted at face value, see *Anderson*, supra, 477 U.S. at 255, could present significant difficulties for Wilner's motion for summary judgment. Considered in context, however, Northrup's declaration cannot change the result. n20

-----Footnotes-----

n20 We agree with the plaintiffs that Northrup's declaration and other materials submitted by them were properly a part of the summary judgment calculus, and that the judge should therefore have considered them. The meaning conveyed by the column may be established "by the words themselves, or by extrinsic facts with which they are connected." *Chaloner v. Washington Post Co.*, 36 App. D.C. 231, 233 (1911). Because this court must make an independent review of the record, and because we have given extensive consideration to the plaintiffs' materials, the refusal of the trial judge to do so does not affect the outcome.

-----End Footnotes-----

[**65]

The quoted sentence of Northrup's affidavit concerns the legal conclusion that, according to him, a presumably sophisticated railroader would draw from the column. The question whether the words that Wilner has written are fairly susceptible of such a meaning is one of law. See [*602] RESTATEMENT (SECOND) OF TORTS, *supra*, § 614 (1). The court, and not a lay expert witness (or, for that matter, a reader familiar with the railroad industry) decides such questions as whether "bolting" from national negotiations (by opting for local ones) violates the RLA. Professor Northrup's comments concern a column which says nothing directly about the RLA, and which suggests, at most, a belief on Wilner's part that the plaintiffs did not negotiate as generously as they ought to have done, and that they litigated more than they should have done. In our view, Northrup's claimed expertise in railroad matters cannot qualify him to decide whether the column is libelous.

If Professor Northrup's affidavit is supposed to suggest that the column in fact charges or implies a violation of the RLA, and if the court discerns no such allegation or implication in the column, then the court's resolution of [*66]an issue of law necessarily trumps the views of a witness, even one with Professor Northrup's qualifications. If, on the other hand, Northrup means that, even if the column does not on its face allege or imply RLA violations on Guilford's part, persons in the railroad business would believe that it does charge Guilford with contravening the statute, then Wilner cannot be held responsible for the railroaders' erroneous beliefs. To the extent that Northrup may be suggesting that Wilner is writing in a code - in "railroadese," perhaps - that railroad people will understand, even if judges do not, then we believe that such a suggestion is too remote to support a finding of defamation by implication. We agree with Judge Huvelle that the kinds of implications that the plaintiffs attribute to the column go well beyond the sense of the published words.

[HN37] An affidavit in opposition to a motion for summary judgment must be based on the affiant's personal knowledge. Super. Ct. Civ. R. 56 (e). Professor Northrup has no personal knowledge, and claims none, regarding whether an unidentified railroader would interpret Wilner's column as attributing RLA violations to the plaintiffs. Arguably, Northrup[*67] could be qualified as an expert witness and permitted to express opinions on the subject of his expertise. In our view, however, the conclusion that unidentified readers might draw from the column as to the lawfulness of the plaintiffs' conduct is not a proper subject of expert testimony. [HN38] An expert witness generally may not express an opinion on a question of law, see *Weston v. Washington Metro. Area Transit Auth.*, 316 U.S. App. D.C. 321, 323, 78 F.3d 682, 684, amended on reh'g, 318 U.S. App. D.C. 142, 86 F.3d 216 (1996), and an opinion as to what others may, rightly or wrongly, believe about the law is not significantly different.

The plaintiffs' opposition to Wilner's motion for summary judgment has been constructed with considerable skill and sophistication, and the issue before us is not an easy one. But if the judgment is reversed, and if Wilner is compelled to continue to litigate the case through trial and the inevitable appeals, the potential chilling effect upon robust debate and freedom of expression may be quite substantial. For all of the foregoing reasons, we are satisfied that the entry of summary judgment against Guilford was appropriate. [*68] See *Keogh*, *supra*, 125 U.S. App. D.C. at 35, 365 F.2d at 968; *Myers*, *supra*, 472 A.2d at 50; *Nader*, *supra*, 408 A.2d at 42-44.

(4) The claim that Fink and Mellon were personally defamed.

We agree with the trial judge that the comments in the column about Mellon and Fink do not make either man appear "odious, infamous, or ridiculous." *Best*, *supra*, 484 A.2d at 989; see also *PROSSER AND KEETON*, *supra*, § 111, at 773-74 (defamation "involves the idea of disgrace"). The implication in Wilner's column that Mellon is a kind of dilettante, and that he, and perhaps Fink too, lack seriousness as businessmen, is the quintessential kind of commentary - provocative, perhaps, but hardly libelous - which is entitled to protection under the First Amendment. The [*603]

column was, after all, written in response to Guilford's attempt to acquire and to privatize portions of Amtrak's operations. In a society which regards freedom of the press as a core value, a newspaper columnist must surely have the right to question the qualifications of the would-be privatizers, as well as their motivations and business acumen, without fear of retaliatory litigation. [**69] A jurisprudential giant has said it well:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .

Abrams v. United States, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) (Holmes, J., dissenting). The plaintiffs have the means to respond to critical Op-Ed columns, and under our Constitution they may not be denied the opportunity to do so. At the same time, the right of the Wilners of the world to have their say must also be preserved.

III.

CONCLUSION

In the Moldea case, the New York Times' reviewer of the plaintiff's book accused the plaintiff, inter alia, of "too much sloppy journalism" and "attacked Moldea's competence as a practitioner of his chosen profession, a matter archetypically addressed by the law of defamation." Moldea I, supra, 304 U.S. App. D.C. at 409, 15 F.3d at 1140. The court initially held[**70] that "the accuracy of [some] statements in the review is sufficiently open to dispute that we cannot hold as a matter of law that no reasonable juror could find them to be false." Id. But after setting aside the trial court's order granting summary judgment in favor of the newspaper, Moldea I, the court reconsidered the issue, modified its prior opinion, and affirmed the District Court's ruling. Moldea II. The court stated:

Unfortunately, [the Moldea I] opinion failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations. While there is no per se exemption from defamation for book reviews, our initial resolution of this case applied an inappropriate standard to judge whether the Times review was actionable.

306 U.S. App. D.C. at 3-4, 22 F.3d at 311-12. An Op-Ed column in a trade newspaper is indistinguishable in principle from a book review, and application to this record[**71] of Moldea II's reasoning dooms the plaintiffs' action.

Affirmed. n21

-----Footnotes-----

n21 We have also taken into consideration Pease's deposition testimony regarding Wilner's alleged admission "that the items in the article were false." For purposes of a motion for summary judgment, Pease's testimony must be credited. Nevertheless, the allegedly false "items" have not been identified, and none of the claims of inaccuracy presented to us by the plaintiffs in the Northrup declaration or in their brief supports reversal of the judgment. We are confident that if Wilner in fact admitted to Pease that particular statements in the column were false, then these allegedly false statements have been addressed in counsel's very comprehensive and thorough submissions on the plaintiffs' behalf.

-----End Footnotes-----

ROBERT DALE HARRISON, Plaintiff-Appellee, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, TENNESSEE, Defendant-Appellant, BOARD OF HEALTH OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendants.
No. 94-6042

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

80 F.3d 1107; 1996 U.S. App. LEXIS 6602; 1996 FED App. 0113P(6th Cir.); 73 Fair Empl. Prac. Cas. (BNA) 109

December 8, 1995, Argued
April 8, 1996, Decided
April 8, 1996, Filed

PRIOR HISTORY: [**1] ON APPEAL from the United States District Court for the Middle District of Tennessee. 80-03271. John T. Nixon, Chief District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of a judgment by the United States District Court for the Middle District of Tennessee, which entered a judgment finding defendant in contempt of a 1982 consent decree terminating litigation between plaintiff and defendant. The district court also directed defendant to pay all costs and plaintiff's attorney fees.

OVERVIEW: In previous litigation, a consent decree was entered by the district court which found that defendant denied plaintiff promotional opportunities on account of his race, and that they had retaliated against him for filing a complaint. After plaintiff was dismissed from his employment, plaintiff filed a petition of contempt alleging that defendant failed to comply with the earlier imposed judgment and ultimately terminated him on account of his race and in retaliation for filing a complaint. The court affirmed the decision of the district court in part because there was sufficient evidence entered to show that plaintiff was not offered any training after his earlier reinstatement as required under the consent decree, and defendant failed to promote plaintiff. The court reversed the judgment of the district court pertaining to job seniority, a finding of discrimination, and a finding of harassment and retaliation by defendant because these decisions were clearly erroneous. The court found that no evidence pertaining to pay, seniority or racial hostility was offered by plaintiff and the district court incorrectly compared the discipline of employees who were not similarly situated.

OUTCOME: District court's judgment finding defendant in contempt was affirmed in part because defendant failed to train or promote plaintiff as required by a previously entered consent decree. The court reversed the judgment as it pertained to seniority, discrimination, and harassment because the findings of the district court were clearly erroneous and not supported by sufficient evidence.

CORE TERMS: consent decree, promotion, training, infraction, termination, harassment, driving, pound, paperwork, written reprimand, clean slate, retaliation, seniority, discipline, terminated, contempt, supervisor, rabies, reinstatement, comparable, promoted, suspension, memorandum, duty, consent judgment, supervisory, cat, clear and convincing evidence, prima facie case, discriminatory

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Entry of Judgments: Specific Acts

[HN1] In order to hold the defendants in civil contempt, a district court must find that the plaintiff established by clear and convincing evidence that the defendants violated the court's prior order.

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***, 73 Fair Empl. Prac. Cas. (BNA) 109

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

Civil Procedure: Sanctions: Contempt

[HN2] The court reviews the district court's finding of civil contempt for an abuse of discretion.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

[HN3] A district court may abuse its discretion when it relies on clearly erroneous findings of fact.

Civil Procedure: Appeals: Standards of Review: Standards Generally

[HN4] In examining findings of fact, the court may reverse only if after a review of all the evidence, the court is left with the definite and firm conviction that a mistake has been committed.

Civil Procedure: Appeals: Standards of Review: De Novo Review

Civil Procedure: Entry of Judgments: Consent Decrees

[HN5] The court reviews the district court's interpretation of a consent decree de novo.

Labor & Employment Law: Discrimination: Disparate Treatment

[HN6] In a disparate treatment claim in which there was no direct evidence of discrimination. The court applies the familiar three-part analysis: (1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual.

Labor & Employment Law: Discrimination: Disparate Treatment

[HN7] A plaintiff may establish a prima facie case of discriminatory discipline by showing that: (1) he belongs to a racial minority; and (2) for the same or similar conduct, he was treated differently than similarly situated non-minority employees.

Labor & Employment Law: Discrimination: Disparate Treatment

[HN8] In comparing employment discipline decisions, precise equivalence in culpability between employees is not required.

Labor & Employment Law: Discrimination: Disparate Treatment

[HN9] The plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness."

Labor & Employment Law: Discrimination: Disparate Treatment

[HN10] The plaintiff must demonstrate that the non-minority employees to be compared with himself were "similarly-situated in all respects."

Labor & Employment Law: Discrimination: Disparate Treatment

[HN11] The individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Labor & Employment Law: Discrimination: Title VII

[HN12] For harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN13] One element required for proof of sexual harassment is that the alleged harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment.

Labor & Employment Law: Discrimination: Sexual Harassment: Coverage & Definitions

[HN14] The court determined that the elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment.

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***, 73 Fair Empl. Prac. Cas. (BNA) 109

Labor & Employment Law: Discrimination: Retaliation

[HN15] The 1964 Civil Rights Act protects an employee who has opposed any practice made an unlawful employment practice by Title VII or who has made a charge under the statutory scheme. 42 U.S.C.S. § 2000e-3(a).

Labor & Employment Law: Discrimination: Retaliation

[HN16] A prima facie retaliation claim is established by showing the following: (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

COUNSEL: For ROBERT DALE HARRISON, Plaintiff - Appellee: Abby R. Rubenfeld, [COR ret], Nashville, TN. Susan S. Garner, ARGUED, BRIEFED, [COR LD NTC ret], Turner Law Offices, Nashville, TN.

For METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant - Appellant: John L. Kennedy, BRIEFED, [COR LD NTC ret], Stephen Nunn, ARGUED, BRIEFED, [COR ret], The Metropolitan Government of Nashville & Davidson County Department of Law, Nashville, TN.

JUDGES: Before: LIVELY, KENNEDY, and RYAN, Circuit Judges. LIVELY, J., delivered the opinion of the court, in which RYAN, J., joined. KENNEDY, J. (pp. 21-23), delivered a separate opinion concurring in part and dissenting in part.

OPINIONBY: LIVELY

OPINION: [***2]

[*1110] LIVELY, Circuit Judge. The defendant, Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), appeals from a judgment of the district court entered on June 14, 1994, finding it in contempt of a 1982 consent decree terminating litigation between the plaintiff, former Metro employee Robert Dale Harrison, and Metro. The district court, which had retained jurisdiction over the case after entering the consent decree, granted Mr. Harrison's motion to reopen the case upon his filing a petition for an adjudication of civil contempt. Following a four-day hearing, the district court found Metro in contempt and ordered it to perform specific affirmative acts in addition to paying the plaintiff for lost earnings. The court also directed Metro to pay all costs and the plaintiff's attorney fees. Upon Metro's posting a supersedeas bond, the district[**2] court stayed the money judgment, but refused to stay the injunctive provisions of its decree.

[*1111] I.

A.

The plaintiff, who is black, was hired by Metro in 1972 to work in the Rabies Control Division of the Metropolitan Health Department (the Health Department). The Rabies Control Division is located in the Animal Control Facility (the pound). Mr. Harrison filed an employment discrimination action in district court on June 12, 1980, against Metro, the Board of the Health Department (the Board) and Board members. The plaintiff alleged that the defendants had denied him promotional opportunities on account of his race, and that they had retaliated against him for filing a complaint with the Equal Employment Opportunity Commission (EEOC). At the time of the lawsuit, Mr. Harrison was employed as a Rabies Control Officer I. [***3]

Pursuant to an agreement among the parties, the district court entered an Order of Judgment on May 17, 1982 (1982 Judgment or the consent decree), which directed the defendants to reinstate Mr. Harrison at the Rabies Control Officer II level; to calculate his annual leave and sick days as if there had been no break in his employment; and to pay Mr. Harrison[**3] \$15,000 in back pay and \$5,000 in attorney fees, plus costs. The consent decree also contained the following affirmative provisions:

2. The plaintiff shall receive any on-the-job training necessary to perform efficiently in the position [of Rabies Control Officer II] and for promotion to the position of Rabies Control Officer III upon such position becoming available and plaintiff meeting the qualifications therefor.

3. Job seniority will be calculated as if the plaintiff had been on the job with no break in service.

* * *

7. The defendants shall not discriminate against plaintiff or other black persons on account of race, or on account of his complaints against racial discrimination or this lawsuit.

Metro paid Mr. Harrison \$20,000 and reinstated him on June 1, 1982, as a Rabies Control Officer II. He was then reclassified in 1989 as a Senior Rabies Control Officer, as were all other employees who formerly held Rabies Control Officer II or III positions.

B.

Under the applicable civil service rules, the pound was required to enforce a progressive disciplinary policy which provided that an employee would receive a written reprimand[**4] for a first infraction of work rules, suspension for a second infraction, demotion for a third infraction and termination for a fourth infraction. With respect to driving accidents, the policy at the pound was to give an oral [***4] reprimand for an employee's first accident, a written reprimand for the second, suspension without pay for the third, and to terminate the employee after the fourth. During the plaintiff's employment, and after his reinstatement, a new pound manager, Larry Cole, implemented a policy by which all driving accidents that occurred prior to October 1988 would be "wiped clean" from the employees' records.

In 1989, the plaintiff received an oral reprimand after hitting the rear of another car in a driving accident. He received a written reprimand for colliding into a police car at an intersection in July 1991. In August 1991, Mr. Harrison was suspended for six days without pay after he allegedly encouraged Jeffrey Baker, another rabies control officer, to leave his assigned territory to help him capture stray cats. The defendants claimed that leaving one's territory as well as picking up cats was against pound policy. Mr. Harrison appealed his suspension to[**5] the Board under the civil service grievance procedure in May 1992, but apparently to no avail.

The plaintiff had two more driving accidents, one in September 1991 and one in the fall of 1992, the latter of which he allegedly failed to report to his supervisor according to pound practice. At around the same time, Mr. Harrison was involved in two incidents in which he was allegedly rude to customers. Further, on July 30, 1992, the plaintiff received a written reprimand for excessive errors in paperwork.

[*1112] On July 31, 1992, Paul Botranger, the Director of the Bureau of Environmental Health Services, issued a memorandum to all rabies control personnel regarding errors commonly made on receipts. The defendants had discovered these errors after reviewing all paperwork completed by pound employees between October 29, 1991, and July 27, 1992. On September 28, 1992, Mr. Botranger wrote a memorandum to Dr. Fredia Wadley, the director of the Health Department, indicating that Mr. Harrison continued to make the mistakes pointed out in his [***5] July 31 memorandum. Although a number of employees continued to forget to write in the number of days an animal had been impounded, the plaintiff was[**6] allegedly the only employee who consistently failed to follow proper procedure in correcting errors on receipts. Mr. Botranger therefore recommended that Mr. Harrison be terminated.

On November 2, 1992, Dr. Wadley informed Mr. Harrison in writing that he was terminated. Initially, the plaintiff was terminated on the grounds that he had been involved in four vehicular accidents, had failed to report his fourth accident to his supervisor, had made excessive paperwork errors and had been rude to the public. However, after Mr. Harrison appealed his dismissal to the Board in February 1993, the Board upheld his dismissal only on the grounds of careless driving and paperwork errors.

Mr. Harrison filed four separate charges with the EEOC after his 1982 reinstatement alleging discrimination and/or retaliation in his employment at the Health Department. In 1992, he also complained either orally or in writing to his

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***, 73 Fair Empl. Prac. Cas. (BNA) 109

supervisor, the director of the Health Department and the mayor of Nashville about how he felt he had been harassed at the pound.

C.

On December 30, 1993, the plaintiff filed the petition of contempt alleging that Metro, the Board and Board members failed to comply with[**7] the 1982 Judgment and ultimately terminated him on account of his race and in retaliation for filing a complaint with the EEOC. On the same day, Mr. Harrison filed a separate federal complaint arising out of the same facts and alleging unlawful race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., and Tennessee law. The district court consolidated the two cases.

After an evidentiary hearing, the court found that the defendants had paid Mr. Harrison \$20,000 and rehired him [**6] as a Rabies Control Officer II, but were in contempt because they had "failed to take all reasonable steps to comply" with the order's directives in the areas of training, promotion, seniority and anti-discrimination. Accordingly, the court included affirmative directives in its 1994 judgment similar to those in the 1982 consent decree.

On appeal Metro argues that the district court's findings that the defendants violated the 1982 consent decree by failing to train, failing to promote, failing to grant seniority and pay at the required level, and harassing and discriminating against the plaintiff in disciplining and terminating[**8] him are all clearly erroneous. Metro also contends that the district court, in the guise of interpreting the 1982 consent decree, actually rewrote it. TII.

A.

[HN1] In order to hold the defendants in civil contempt, a district court must find that the plaintiff established by clear and convincing evidence that the defendants violated the court's prior order. *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991) (citing *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). In fact, each finding of a violation of the order must be supported by clear and convincing evidence. See 934 F.2d at 710-13. The test for determining a violation is whether the defendants failed to take "all reasonable steps within their power to comply with the court's order." *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989). [HN2] We review the district court's finding of civil contempt for an abuse of discretion. *Id.* at 968. [HN3] A district court may abuse its discretion when it relies on clearly erroneous findings of fact. *Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993) (citation omitted). [HN4] In examining [*1113] findings of fact, this court may reverse[**9] only if after a review of all the evidence, we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985) (quotation marks and citation omitted). "Where there are [**7] two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. [HN5] We review the district court's interpretation of the consent decree de novo. *Stotts v. Memphis Fire Dep't*, 858 F.2d 289, 299 (6th Cir. 1988) (citation omitted).

B.

With these principles in mind, we now consider each claim of a clearly erroneous finding separately.

1. Training

The district court found that the defendants had failed to exercise reasonable diligence in complying with the 1982 consent decree because despite the order's training directive, "Mr. Harrison was . . . excluded from opportunities to improve his skills and gain training credentials." On appeal, Metro asserts that the training provision of the 1982 Judgment should be construed to require only that it provide the plaintiff with "whatever on-the-job training was normally provided to Rabies Control Officers[**10] II and Rabies Control Officers III" No proof, it says, was ever presented to suggest that any formal training was "necessary" for the positions of Rabies Control Officer II or for promotion to level III.

We do not disagree with Metro's construction of the training requirement. Nevertheless, the district court explicitly found training was indeed offered to other rabies control officers, whether "necessary" or not, while Mr. Harrison was not afforded any such opportunities. Specifically, witnesses testified that at least three white rabies control officers--

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***; 73 Fair Empl. Prac. Cas. (BNA) 109

Victoria Maxwell, Billy Hendrixson and Kenneth Chambers--attended a four- or five-day training session on supervisory skills as well as another training session on animal control. Although the testimony is conflicting, there is also sufficient evidence to show that Mr. Harrison was not offered any training after his reinstatement except for euthanasia training from which he was excused and perhaps some private counseling regarding his paperwork mistakes. In fact, the evidence suggests that [***8] he and three other black employees were never even apprised of such training opportunities, and that they only heard about[**11] such training after-the-fact when employees who had attended discussed the matter. Thus, the district court's finding of a violation of the training provision is not clearly erroneous.

2. Promotion

Next, the district court found that the defendants failed to promote Mr. Harrison "as directed." Metro contends that the plain language of the 1982 Judgment requires only that the plaintiff be considered for a promotion if and when a Rabies Control Officer III position became available. Metro points out that those employees who were promoted to the position of Rabies Control Officer III were promoted before the 1982 Judgment was in effect. According to Metro, between the date of entry of the consent decree until the level II and III positions were combined in 1989 into the new position of Senior Rabies Control Officer, there were no vacancies in the position of Rabies Control Officer III. Citing *United States v. Armour & Co.*, 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971) (consent decree must be construed by its express terms since the defendant waived his due process right to litigate the issues in exchange for the decree), Metro argues that the district court's construction of the 1982 Judgment[**12] required automatic promotion of Mr. Harrison and therefore erroneously went beyond the four corners of the consent decree. See also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574, 81 L. Ed. 2d 483, 104 S. Ct. 2576 (1984).

Armour admonishes courts to interpret the scope of a consent decree "within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Armour*, 402 U.S. at 682. However, even if we accept Metro's [*1114] interpretation of the 1982 Judgment, the district court's finding in the area of promotions was not clearly erroneous. In its September 1994 memorandum addressing Metro's motion for stay of judgment, the district court explained that it had "specifically rejected Defendant's argument that Defendant failed to promote [***9] Plaintiff as ordered because no promotions to Rabies Control Officer III were available after Plaintiff was reinstated." The court then noted that "it was Defendant's unlawful conduct that resulted in Plaintiff being terminated, and Defendant should not be rewarded for taking actions during Plaintiff's illegal termination which then made it 'impossible' for Defendant to comply with the Court's Order."

We understand[**13] the district court to be referring to its belief that the Rabies Control Officer III positions were "filled" by the defendants prior to Mr. Harrison's reinstatement in order to circumvent the promotion provision of the 1982 Judgment. The court's inference can be supported by the record. The record contains evidence of bad faith in that it indicates the defendants denied Mr. Harrison's request for reinstatement as a Rabies Control Officer III in 1982 on the ground that no level III position was available. Yet in that same year, three employees were promoted to the position of Rabies Control Officer III, and two of the three employees who were promoted had less seniority than the plaintiff. Mr. Harrison then formally applied for the position of Rabies Control Officer III in 1984 and 1988, but again was denied, at least once because Metro had not yet "posted a [position for] R.C. Officer III." As the district court found, however, promotional opportunities were disseminated only by word of mouth and were never publicly posted or made known to the plaintiff, despite civil service rules that required such opportunities to be announced and advertised in a manner such that all eligible[**14] employees could apply. Finally, the record suggests that the defendants could create positions at will, because Mr. Harrison's position as a Rabies Control Officer II was created especially for his 1982 reinstatement, and because Metro eliminated the title distinctions between level II and level III officers altogether in 1989. This evidence convinces us that the district court's view that the defendants did not exert the requisite diligence in complying with its order was not clearly erroneous. See *Glover*, 934 F.2d at 708 (citing *Fortin v. Commissioner of Massachusetts Dep't of Pub. Welfare*, 692 F.2d 790, 796-97 [***10] (1st Cir. 1982), for the proposition that the defendants have the burden of proving impossibility of compliance).

3. Seniority

The third directive of the 1982 Judgment states: "Job seniority will be calculated as if the plaintiff had been on the job with no break in service." Metro maintains that the district court abused its discretion because its finding that the defendants violated this provision was not supported by clear and convincing evidence. The district court found that

80 F.3d 1107, *; 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***, 73 Fair Empl. Prac. Cas. (BNA) 109

"Mr. Harrison was paid less than all other Senior Officers and was[**15] the only Senior Officer to be denied supervisory responsibilities."

Here we agree with Metro. Although the plaintiff was the second most senior employee at the pound and received less pay than the other Senior Rabies Control Officers, the plaintiff presented no evidence that an employee at the pound would necessarily receive higher pay than all employees junior to him. The evidence showed that while longevity pay was based on years of service, step increases in salary were based only on merit. Mr. Harrison did in fact receive the second highest longevity pay of all the pound employees. Although the failure of the plaintiff to start at the same pay step or to progress up the pay scale at the same rate as his colleagues might be evidence of discrimination or retaliation, it does not support a finding that the defendants violated the order with respect to restoring Mr. Harrison's full seniority.

In addition, even though the record demonstrates that Mr. Harrison was denied the supervisory responsibilities given to all other Senior Rabies Control Officers, there is no proof that supervisory duties were a necessary incident to seniority. Since the consent decree at issue does not expressly[**16] state that supervisory duties must be given to the [*1115] plaintiff, we decline to read such a requirement into the decree. See *Stotts*, 467 U.S. at 574-75. The district court's finding that the defendants violated the consent [***11] decree by failing to "calculate" Mr. Harrison's seniority as directed was therefore clearly erroneous.

4. Discrimination

The district court found clear and convincing evidence that the defendants had violated the anti-discrimination provision of the 1982 Judgment on two grounds. First, the court held that Mr. Harrison's supervisor, Mr. Cole, had unlawfully harassed or retaliated against Mr. Harrison and had been "unresponsive to Mr. Harrison's complaints about harassment." Second, the court held that the reasons articulated for firing the plaintiff were pretext for discrimination, pointing to its finding that Mr. Harrison was punished more severely than other employees for his infractions. In this regard, the district court also questioned the legitimacy of Metro's audit for paperwork errors.

Mr. Harrison presented [HN6] a disparate treatment claim in which there was no direct evidence of discrimination. Thus, we apply the familiar three-part analysis: [**17] (1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). Metro argues that the district court erred because it failed to explicitly employ the McDonnell Douglas/Burdine framework of proof in its analysis of the facts at bar. However, even though the district court did not use "magic words," we are satisfied that the court's finding of discriminatory discipline in violation of the consent decree was not clearly erroneous.

[HN7] A plaintiff may establish a prima facie case of discriminatory discipline by showing that: (1) he belongs to a racial minority; and (2) "for the same or similar conduct, he was treated differently than similarly-situated non-minority employees." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992). The Supreme Court has [***12] noted that [HN8] in comparing employment discipline decisions, "precise equivalence in culpability[**18] between employees" is not required. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). Rather, [HN9] the plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.*; *Stotts*, 858 F.2d at 296; *Mitchell*, 964 F.2d at 583 n.5. [HN10] The plaintiff must also demonstrate that the non-minority employees to be compared with himself were "similarly-situated in all respects." *Mitchell*, 964 F.2d at 583 (emphasis in original). Accordingly,

[HN11] The individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Id.

We agree with Metro that the district court improperly compared the discipline the plaintiff received and the discipline meted out to some of the other blundering employees because those employees were not "similarly-situated" with

respect to Mr. Harrison. Thus, H. B. Tomlinson, Ed Watkins and Willie Swafford, each identified by the[**19] district court as having received more lenient discipline than the plaintiff, were inappropriate comparables. However, the plaintiff's disciplining may be compared with that of any non-minority rabies control officer under the supervision of Mr. Cole. Mitchell, 964 F.2d at 583. For comparison of discipline records, the plaintiff identified Robert Rhodes and Troy Kelley as white rabies control officers who also have poor driving records. We look to see whether their infractions were of "comparable seriousness." Santa Fe Trail, 427 U.S. at 283 n.11.

[*1116] Mr. Rhodes had twelve motor vehicle accidents in eight years, two of which occurred after the "clean slate" policy [***13] was implemented. During Mr. Cole's tenure, Mr. Rhodes was also accused of speeding in a Metro vehicle, and of twice improperly removing a dog from pound property, although there is some dispute over whether the dog incidents occurred during Mr. Cole's administration. For each "type" of infraction--the two driving accidents which occurred after the "clean slate" policy went into effect, the speeding incident and the dog incidents--Mr. Rhodes received no more than a written reprimand.

Mr. Kelley had four motor[**20] vehicle accidents. Two of them occurred after the 1988 "clean slate" cut-off date. He was not disciplined for the first of his post-1988 accidents because the pound did not consider him to be at fault, but then received a written reprimand after his last accident because of his involvement in the collision and because of his failure to notify his supervisor of the accident. In February 1991, Mr. Kelley received another written reprimand for confronting animal rights activists in a hostile manner. In October 1992, he received a third written reprimand after he was found to be intoxicated while on duty. In addition, the testimony at the hearing suggested that Mr. Kelley often came to work while intoxicated, that he was arrested during work hours for driving under the influence of alcohol, and that he was allowed to drive Metro vehicles despite the fact that his driver's license had been revoked for a DUI conviction.

In comparison, the plaintiff was involved in four traffic accidents while driving a Metro vehicle between 1989 and 1992. He received traffic tickets as a result of only two out of the four accidents, and both tickets were ultimately dismissed. He maintained that he was[**21] not at fault in one of the instances in which he was ticketed because the accident occurred as a result of a faulty traffic light. Further, Mr. Harrison was accused of encouraging another employee to leave his assigned territory to pick up cats, of being rude to members of the public on two occasions, of failing to report his fourth and final accident to his supervisor and of committing too many paperwork errors. As a defense witness admitted, the progression of discipline [***14] for the plaintiff before his termination was as follows: an oral reprimand for his 1989 accident, a written reprimand for his July 1991 accident, and suspension for picking up cats and securing the help of a co-worker not assigned to that territory. He was ultimately terminated on the stated grounds of a combination of his infractions.

The respective conduct of Mr. Rhodes, Mr. Kelley and Mr. Harrison are of comparable seriousness. Each was involved in multiple driving accidents, although Mr. Rhodes and Mr. Kelley fortuitously had only two such accidents after the "clean slate" policy went into effect. Mr. Rhodes and Mr. Kelley were each involved in other sorts of misconduct at least as comparable in seriousness [**22] to that of Mr. Harrison, if not more serious, ranging from rudeness to the public to being intoxicated at work. However, Mr. Harrison was treated differently than his co-workers. The defendants apparently treated Mr. Rhodes' and Mr. Kelley's infractions as falling into separate categories such that neither employee ever received more than a written reprimand. Mr. Harrison's infractions, in contrast, were considered cumulatively, evidenced by the fact that he was suspended without pay for the cat incident even though he had never committed a similar infraction. The plaintiff was also treated differently with respect to his termination, since neither Mr. Rhodes nor Mr. Kelley was terminated as a result of their careless driving standing alone, or taken together with their assortment of other offenses. Also, many other rabies control officers made mistakes in paperwork, but none was ever discharged on that ground.

Having established a prima facie case of disparate treatment, the plaintiff raised an inference that his employer more likely than not took its actions based on impermissible factors. *Burdine*, 450 U.S. at 254 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943[**23] (1978)). The burden then shifted to the defendants to articulate a legitimate, nondiscriminatory reason for their actions. 450 U.S. at 253-54. [*1117] Here, the defendants did not offer any reason for suspending Mr. Harrison after his first [***15] offense of that particular kind. The presumption of discrimination thus remains, and our inquiry concerning this disciplining is at an end.

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***, 73 Fair Empl. Prac. Cas. (BNA) 109

As to Mr. Harrison's termination, the defendants pointed out that no other employee had a succession of four accidents after 1988, and no other employee made as many errors in paperwork. Since the defendants met their burden of production on the issue of discriminatory discharge, the plaintiff was left with the burden of proving that the defendants' stated reasons for firing him were pretext for discrimination. *Burdine*, 450 U.S. at 253, 256; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 2747-48, 125 L. Ed. 2d 407 (1993). On this point, the district court explicitly found that "Metro's rationale for firing Mr. Harrison [was] pretextual," and we agree. Although Metro relies on its stated discipline policies, the record shows that neither the "clean slate" policy nor the progressive discipline policies were uniformly applied. In a written reprimand for one of Mr. Rhodes' post-1988 accidents, Mr. Cole admonished Mr. Rhodes for his numerous accidents prior to 1988 despite his "clean slate" policy. And although the plaintiff was terminated, in part, as a result of his fourth accident, he was never suspended upon his third accident. No evidence was presented as to whether Mr. Rhodes was ever disciplined for his ten accidents before the "clean slate" policy went into effect, although it is undisputed that prior to that time, the civil service rules would have required termination upon four infractions.

Moreover, the district court "questioned the legitimacy of Metro's paperwork audit," which supposedly revealed Mr. Harrison's excessive errors. The court found that the defendants' audit showed that Mr. Harrison made 38 errors in comparison to the 12 errors made by all the other employees combined. However, other evidence supported a finding that all comparable employees, and even Mr. Cole himself, made numerous errors. In fact, a witness for the plaintiff testified that her analysis showed that 99 percent of the receipts written out during the period covered by the defendants' audit contained errors.

Whatever the number may have been, the district court found that the defendants' actions or inaction contributed to Mr. Harrison's paperwork troubles. Mr. Harrison was first assigned to paperwork duty in the office in October 1991 and worked in the office only every fifth week. Furthermore, although the defendants claimed that Mr. Harrison was given adequate training for his office duties, the district court accepted Mr. Harrison's contention that he did not. Thus, the record supports the district court's finding that the reasons given for Mr. Harrison's termination were a pretext for discrimination.

On the basis of this record, we find no clear error in the finding of discriminatory discipline, including termination.

5. Harassment and Retaliation

a.

To determine whether the plaintiff was the victim of racial harassment in violation of the 1982 Judgment, we look to the standards applicable to hostile work environment cases under Title VII law. In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), the Supreme Court held that [HN12] for harassment to be actionable, "it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (quotation marks and citation omitted). The district court relied on relatively few incidents over a rather lengthy period of time to find that the defendants were guilty of harassing the plaintiff in the work setting. Metro argues that some of the incidents had no racial connotations, or were not directed at Mr. Harrison. Metro's principal contention with respect to harassment, however, is that the incidents were too few and isolated to support a finding of racial harassment.

As reprehensible as the incidents of alleged harassment may have been, we do not find that they constituted an [***17] unreasonably abusive environment. See *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988), cert. denied, 490 U.S. 1110, 104 L. Ed. 2d 1028, 109 S. Ct. 3166 (1989). [HN13] One element required for proof of sexual harassment is that the alleged harassment "had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment" *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 95 L. Ed. 2d 823, 107 S. Ct. 1983 (1987). In [***27] *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989), relying on *Patterson v. McLean Credit Union*, 491 U.S. 164, 180, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), [HN14] we determined that the elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment.

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***; 73 Fair Empl. Prac. Cas. (BNA) 109

Here, the record reveals that Mr. Harrison testified at the hearing that Mr. Cole's statements, including Mr. Cole's use of a racial epithet, affected him such that he "couldn't hardly think a lot during the day," and had "sleepless and restless nights." Mr. Harrison also testified that he was "rather shocked" in response to a Ku Klux Klan hood incident at work and that it caused him "a lot of stress." Further, the district court observed that a physician who had diagnosed Mr. Harrison as having stress-related situational insomnia stated that Mr. Harrison worked "under a great deal of stress with a manager who is trying to run him off of a job." However, the plaintiff has failed to present evidence that his work performance was affected by the racial hostility, even if only in his own opinion. We conclude that the finding of harassment was therefore clearly[**28] erroneous.

b.

[HN15] The 1964 Civil Rights Act protects an employee who has "opposed any practice made an unlawful employment practice" by Title VII or who has made a charge under the statutory scheme. 42 U.S.C. § 2000e-3(a) (1988). Like a disparate treatment claim, proof of a retaliation claim under federal employment discrimination law is governed by the [***18] McDonnell Douglas/Burdine tripartite framework of shifting burdens of production and proof. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). [HN16] A prima facie retaliation claim is established by showing the following: "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Wrenn*, 808 F.2d at 500; see also *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir.), cert. denied, 498 U.S. 984, 112 L. Ed. 2d 528, 111 S. Ct. 516 (1990); compare *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (following the approach in *Cohen v. Fred Meyer, Inc.*, [**29] 686 F.2d 793, 796 (9th Cir. 1982), which subsumes the element of employer knowledge into the causal connection analysis).

Here, Mr. Harrison has engaged in numerous protected activities known to Metro officials and Metro has clearly taken adverse employment actions against him. Mr. Harrison filed suit against Metro in 1980, resulting in the 1982 Judgment. The parties stipulated that since May 1982, Mr. Harrison filed four charges of discrimination with the EEOC regarding discrimination in his employment at the Health Department. He also wrote a memorandum to Mr. Cole complaining of harassment by Mr. Cole, and sent a copy of this memorandum to the director of the Health Department.

Metro contends, however, that there is no causal relationship between the protected activities and the adverse employment actions imposed upon the plaintiff. Specifically, Metro asserts that Mr. Harrison's suspension in August 1991 and his termination in November 1992 were too far removed from the EEOC complaints he filed in 1986 and 1987 to be causally related.

The Tenth Circuit's decision in *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071, 74 L. Ed. 2d 633, 103 S. Ct. 491[**30] (1982), cited with approval by this [***19] court, has looked to the temporal proximity of the adverse action to the protected activity to determine whether there is a "causal connection." See *Wrenn*, [*1119]808 F.2d at 501. Here, the plaintiff filed an EEOC charge at some point after his August 1991 suspension and was thereafter discharged. At most, one year and three months elapsed between his filing of a charge and his termination. In addition, the evidence showed that three employees feared retaliation because they testified at Mr. Harrison's hearing, and that Mr. Cole made repeated comments that suggested he would not hesitate to run employees out of his department. This evidence, taken together with the timetable of Mr. Harrison's EEOC charge and termination, convinces us that the plaintiff established a prima facie case of retaliation.

More important, however, is the fact that study of the record in this case reveals an atmosphere in which the plaintiff's activities were scrutinized more carefully than those of comparably situated employees, both black and white, and that the defendants took every opportunity to make his life as an employee unpleasant. Although the evidence[**31] does not support a finding of racial harassment, we conclude that it does support a finding a retaliation. Given our earlier approval of the district court's finding that the defendants' proffered reasons for terminating the plaintiff were pretextual, the district court's finding of retaliation was not clearly erroneous.

CONCLUSION

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***; 73 Fair Empl. Prac. Cas. (BNA) 109

Although we have found two of the district court's findings clearly erroneous, we are not required to set aside the finding of contempt. See *Glover*, 934 F.2d at 717. The judge who entered the 1982 consent decree was the same judge who found the defendants in contempt of the injunctive portions of that decree. Judge Nixon's interpretation of his own order is "entitled to great deference." *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991). See also *Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir. 1993) ("few persons are in [***20] a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.") (quoting *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981)).

Furthermore, there is evidence that Metro did not consider the consent decree to be very important. [**32] Remarkably, both Mr. Cole, who was the plaintiff's direct supervisor, and Dr. Wadley, who actually terminated the plaintiff, testified that although they knew of Mr. Harrison's EEOC filings, they knew nothing of the existence of the consent decree. Mr. Cole testified that no one at Metro informed him there was a consent decree in effect. Dr. Wadley testified that she knew of the plaintiff's EEOC filings but did not know that Metro was under a court order to train Mr. Harrison properly and not to discriminate against him. The district court did not abuse its discretion in finding the defendants in contempt.

The judgment of the district court is AFFIRMED in part and REVERSED in part. The case is REMANDED to the district court for its determination of whether our partial reversal requires any changes in remedy. [***21]

CONCURBY: KENNEDY (In Part)

CONCUR: KENNEDY, Circuit Judge. Concurring in part and dissenting in part. I concur in all of the majority opinion except parts II(B)(2) and II(B)(4).

First, in part II(B)(2), the court affirms the District Court's finding that Metro had violated the 1982 consent judgment by failing to promote plaintiff to Rabies Control Officer III. Defendant[**33] argued that no promotions to Rabies Control Officer III were available after plaintiff's reinstatement. In its order denying defendant's motion for stay of judgment, the District Court stated "it was Defendant's unlawful conduct that resulted in Plaintiff being terminated, and Defendant should not be rewarded for taking actions during Plaintiff's illegal termination which then made it 'impossible' for Defendant to comply with the Court's Order."

These promotions -- one of someone with more seniority and the other two, one black and one white -- were made before entry of the consent judgment, a judgment entered without any finding that the termination was [*1120] illegal but by consent without any admission of liability. n1

-----Footnotes-----

n1 There is no claim and no indication in the record that plaintiff was unaware of those promotions at the time he settled his earlier discharge case and entered into the consent judgment. These contempt proceedings were brought more than ten years after the 1982 consent judgment.

-----End Footnotes-----

The relevant[**34] portion of the Order, of which Metro had been found in contempt, orders Metro to

B. Provide Mr. Harrison with any on-the-job training necessary to perform efficiently in the position and for promotion to the position of Rabies Control Officer III upon such position becoming available and Mr. Harrison meeting the qualifications therefor.

This provision does not entitle Mr. Harrison to a promotion; it conditions such a promotion on a Rabies Control Officer III position becoming available and Mr. [***22] Harrison being found to hold the requisite qualifications. Indeed, if Harrison had the qualifications for that office, there would be no need to give him the training. Thus, to the extent the District Court found this provision entitled Mr. Harrison to a promotion, it was in error.

80 F.3d 1107, *, 1996 U.S. App. LEXIS 6602, **;
1996 FED App. 0113P (6th Cir.), ***; 73 Fair Empl. Prac. Cas. (BNA) 109

Moreover, the District Court made no factual findings that Metro somehow violated this provision of the Order by promoting white employees immediately before the Order took effect. In the section of its opinion entitled "Factual Findings," the District Court merely noted that "two employees with less seniority than Mr. Harrison . . . were promoted to Rabies Control Officer III positions." [**35] There is no acknowledgement that these promotions occurred before the consent decree was signed. Likewise, in its "Conclusion of Law" section, the District Court wrote: "Mr. Harrison . . . was never promoted to a Rabies Officer III position. Notably, employees junior to Mr. Harrison served in the position of Rabies Control Officer III"

There is no legal or factual basis to find that Metro violated the consent judgment by these earlier promotions. Since the District Court gave no remedy for the failure to promote plaintiff to Rabies Officer III except to continue the requirement that plaintiff be trained for future promotions, the court's error might be found to be harmless. However, to the extent that it may have included its erroneous conclusion regarding these prior promotions in resolving other issues and particularly the issue of pretext, I would require the District Court to reconsider that issue anew on remand.

Second, while I agree with the majority that there is evidence to support the District Court's finding of discrimination in defendant's treatment of plaintiff's paper errors, and therefore in his firing, I cannot agree that the District Court was entitled to compare[**36] plaintiff's treatment under the clean slate policy with the treatment of persons with accidents before the clean slate policy unless there is some claim -- which there is not -- that the adoption of the clean slate policy was discriminatory. [***23]

Plaintiff's driving infractions occurred after the introduction of the clean slate policy. He was not, therefore, similarly situated in all respects. Under the policy, he could be fired for four accidents. Under the policy, Mr. Rhodes could not be fired. His earlier accidents were wiped clean. Thus, while the court was entitled to compare the treatment of Rhodes with respect to other infractions versus the treatment of plaintiff's errors, it was not, in my opinion, entitled to compare the driving infractions.

I would set aside the above findings and remand for further consideration by the District Court.

DISSENTBY: KENNEDY (In Part)

HICKMAN, ADMINISTRATOR, v. TAYLOR ET AL., TRADING AS TAYLOR & ANDERSON TOWING &
LIGHTERAGE CO., ET AL.

No. 47

SUPREME COURT OF THE UNITED STATES

329 U.S. 495; 67 S. Ct. 385; 91 L. Ed. 451; 1947 U.S. LEXIS2966; 34 Ohio Op. 395

November 13, 1946, Argued
January 13, 1947, Decided

PRIOR HISTORY:

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

A District Court adjudged respondents guilty of contempt for failure to produce, in response to interrogatories, copies of certain written statements and memoranda prepared by counsel in connection with pending litigation. 4 F.R.D. 479. The Circuit Court of Appeals reversed. 153 F.2d 212. This Court granted certiorari. 328 U.S. 876. Affirmed, p. 514.

DISPOSITION: 153 F.2d 212, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner sought review of a judgment of the United States Court of Appeals for the Third Circuit, holding that certain information that petitioner requested from respondents was part of the work product of respondents' attorney and was thus privileged from discovery under Fed. R. Civ. Proc. 26.

OVERVIEW: Respondents, tug boat owners and underwriters, employed a law firm to defend them against potential suits resulting from the sinking of a tug in which crew members drowned. Respondents' attorney interviewed and took written statements from survivors with an eye toward litigation. Petitioner filed interrogatories directed to respondents, some of which requested copies of written statements taken from crew members, detailed reports of oral statements, records, or other memoranda made concerning the tug's sinking. Respondents, through counsel, did not provide the requested materials and were found in contempt of court. The appellate court reversed, describing the materials as privileged work product under Fed. R. Civ. P. 26. On further appeal, the Court found Fed. R. Civ. P. 26 inapplicable because no depositions were involved with the interrogatories. However, petitioner's request, made without purported necessity or justification, for materials which were prepared by respondents' attorney in the course of legal representation fell outside of the arena of discovery and contravened public policy.

OUTCOME: The Court affirmed the judgment although it found that Fed. R. Civ. Proc. 26 was inapplicable to the case. Petitioner had not shown the necessity or justification needed to secure written statements, private memoranda, and personal recollections prepared or formed by respondents' counsel in the course of counsel's legal duties.

CORE TERMS: discovery, interrogatory, tug, preparation, privileged, deposition, Federal Rules of Civil Procedure, deposition-discovery, impressions, exact, set forth, answered, privacy, compelled, survivors, contempt, legal profession, railroad, interview, arisen, crew, failure to produce, good cause, attorney-client, photographing, disclosure, designated, inspection, disclose, tangible

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Discovery Methods: Requests for Production & Inspection

329 U.S. 495, *, 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

[HN1] Fed. R. Civ. P. 34 establishes a procedure whereby, upon motion of any party showing good cause therefor and upon notice to all other parties, the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, etc., not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control.

Civil Procedure: Discovery Methods: Interrogatories

[HN2] See Fed. R. Civ. P. 33.

Civil Procedure: Discovery Methods: Requests for Production & Inspection

[HN3] See Fed. R. Civ. P. 34.

Civil Procedure: Discovery Methods: Oral Depositions

Civil Procedure: Discovery Methods: Written Depositions

[HN4] Fed. R. Civ. P. 26 provides that the testimony of any person, whether a party or not, may be taken by any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence; and that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things.

Civil Procedure: Discovery Methods: Oral Depositions

Civil Procedure: Discovery Methods: Written Depositions

[HN5] See Fed. R. Civ. P. 26.

Civil Procedure: Discovery Methods: Interrogatories

[HN6] Fed. R. Civ. P. 33 does not make provision for production of documents prepared by a party's attorney after the claim has arisen, even when sought in connection with permissible interrogatories.

Civil Procedure: Disclosure & Discovery: Relevance

Civil Procedure: Discovery Methods: Oral Depositions

[HN7] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Fed. R. Civ. P. 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Fed. R. Civ. P. 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

Civil Procedure: Disclosure & Discovery: Privileged Matters

[HN8] The protective cloak of the attorney-client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.

Civil Procedure: Disclosure & Discovery: Work Product

[HN9] Where there is an attempt, without purported necessity or justification, to secure written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Civil Procedure: Disclosure & Discovery

[HN10] Fed. R. Civ. P. 30(b) gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

under Rule 33 -- permissible scope. --

Headnote:

Disclosure by an adverse party's counsel of information gathered by him in anticipation of possible litigation may not be required by interrogatories under Rule 33 of the Federal Rules of Civil Procedure, which provides for interrogation of parties only.

[***HN2]

refusal to answer interrogatories -- matters within knowledge of party's attorney. --

Headnote:

A party cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.

[***HN3]

under Rule 34 -- permissible scope. --

Headnote:

A motion under Rule 34 of the Federal Rules of Civil Procedure which provides for the compulsory production by "any party" of any designated documents, papers, books, accounts, letters, photographs or tangible things not privileged which constitute or contain evidence material to any matter involved in the action is not a proper means of obtaining the right to inspect memoranda of, and written statements of witnesses secured by, an adverse party's counsel in the course of preparation for possible litigation.

[***HN4]

determination of right to discovery notwithstanding procedural irregularity. --

Headnote:

That a party has used the wrong procedural device to enforce inspection of memoranda of, and written statements of witnesses secured by, an adverse party's counsel in the course of preparation for possible litigation, does not relieve the Supreme Court of the United States of the responsibility of determining whether the party has the asserted right of inspection.

[***HN5]

liberal construction of rules as to. --

Headnote:

The deposition-discovery rules (Nos. 27-37) of the Federal Rules of Civil Procedure are to be accorded a broad and liberal treatment, to the end that either party may obtain in advance of trial knowledge of all relevant facts in possession of the other.

[***HN6]

329 U.S. 495, *, 67 S. Ct. 385, **;
91 L. Ed. 451, ***, 1947 U.S. LEXIS 2966

limitations upon right of. --

Headnote:

The right of discovery for which provision is made by the Federal Rules of Civil Procedure has ultimate and necessary boundaries, as where the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the persons subject to the inquiry (Rules 30(b)(d) 31(d)) or when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege (Rule 26(b)).

[***HN7]

attorney-client privilege -- statements procured from witnesses by attorney. --

Headnote:

Memoranda made by an attorney while acting for his client in anticipation of litigation, of information secured from witnesses, briefs, communications and other writings prepared by him for his own use in prosecuting his client's case, and writings which reflect his mental impressions, conclusions, opinions or legal theories, are outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis.

[***HN8]

facts gathered by attorney for adverse party -- insufficiency of showing to require disclosure. --

Headnote:

A party is not entitled to discovery under the Federal Rules of Civil Procedure of written statements in the files of the attorney for the adverse party and of memoranda made by him in anticipation of litigation, without any showing of the necessity for the production of such material or any demonstration that denial of production would cause hardship or injustice, where for aught that appears the essence of what he seeks either has been revealed to him through interrogatories or is readily available to him direct from the witnesses for the asking.

[***HN9]

written materials prepared by adversary's counsel. --

Headnote:

All written materials obtained or prepared by an adversary's counsel with an eye toward litigation are not necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents may under certain circumstances be admissible in evidence or give clues as to the existence of location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.

[***HN10]

necessity of showing facts warranting discovery. --

Headnote:

One seeking disclosure of written materials obtained or prepared by an adversary's counsel in anticipation of litigation must show adequate reasons justifying production through a subpoena or court order.

[***HN11]

memoranda of counsel of adverse party as to statements made by witnesses. --

Headnote:

Without a showing of necessity, the attorney for an adverse party should not be required to disclose to his opponent his mental impressions or memoranda as to oral statements made to him by witnesses equally available to the other party, and it is not enough that such party's counsel wants the statements to help prepare himself to examine witnesses and to make sure that he has overlooked nothing.

SYLLABUS: Under the Federal Rules of Civil Procedure, plaintiff in a suit in a federal district court against certain tug owners to recover for the death of a seaman in the sinking of the tug filed numerous interrogatories directed to the defendants, including one inquiring whether any statements of members of the crew were taken in connection with the accident and requesting that exact copies of all such written statements be attached and that the defendant "set forth in detail the exact provisions of any such oral statements or reports." There was no showing of necessity or other justification for these requests. A public hearing had been held before the United States Steamboat Inspectors, at which the survivors of the accident had been examined and their testimony recorded and made available to all interested parties. Defendants answered all other interrogatories, stating objective facts and giving the names and addresses of witnesses, but declined to summarize or set forth the statements taken from witnesses, on the ground that they were "privileged matter obtained in preparation for litigation." After a hearing on objections to the interrogatories, the District Court held that the requested matters were not privileged and decreed that they be produced and that memoranda of defendants' counsel containing statements of fact by witnesses either be produced or submitted to the court for determination of those portions which should be revealed to plaintiff. Defendants and their counsel refused and were adjudged guilty of contempt. Held:

1. In these circumstances, Rules 26, 33 and 34 of the Federal Rules of Civil Procedure do not require the production as of right of oral and written statements of witnesses secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Pp. 509-514.

2. Since plaintiff addressed simple interrogatories to adverse parties, did not direct them to such parties or their counsel by way of deposition under Rule 26, and it does not appear that he filed a motion under Rule 34 for a court order directing the production of the documents in question, he was proceeding primarily under Rule 33, relating to interrogatories to parties. P. 504.

3. Rules 33 and 34 are limited to parties, thereby excluding their counsel or agents. P. 504.

4. Rule 33 did not permit the plaintiff to obtain, as adjuncts to interrogatories addressed to defendants, memoranda and statements prepared by their counsel after a claim had arisen. P. 504.

5. The District Court erred in holding defendants in contempt for failure to produce that which was in the possession of their counsel and in holding their counsel in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or Rule 34. P. 505.

6. Memoranda, statements and mental impressions prepared or obtained from interviews with witnesses by counsel in preparing for litigation after a claim has arisen are not within the attorney-client privilege and are not protected from discovery on that basis. P. 508.

7. The general policy against invading the privacy of an attorney's course of preparation is so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. P. 512.

8. Rule 30 (b) gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses; but in this case there was no ground for the exercise of that discretion in favor of plaintiff. P. 512.

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

9. Under the circumstances of this case, no showing of necessity could be made which would justify requiring the production of oral statements made by witnesses to defendants' counsel, whether presently in the form of his mental impressions or in the form of memoranda. P. 512.

COUNSEL: Abraham E. Freedman argued the cause for petitioner. With him on the brief were Milton M. Borowsky and Charles Lakatos.

Samuel B. Fortenbaugh, Jr. and William I. Radner argued the cause for respondents. With them on the brief was Benjamin F. Stahl, Jr.

Briefs were filed by Lee Pressman and Frank Donner for the United Railroad Workers of America, and by William L. Standard for the National Maritime Union of America, as amici curiae, urging reversal.

Briefs were filed by B. Allston Moore, James W. Ryan and J. Harry LaBrum for the American Bar Association, and by John C. Prizer, Albert T. Gould, Leslie C. Krusen, D. Roger Englar, Joseph W. Henderson, Jos. M. Rault, Archie M. Stevenson and Thomas E. Byrne, Jr. for the Maritime Law Association of the United States, as amici curiae, urging affirmance.

JUDGES: Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton

OPINIONBY: MURPHY

OPINION: [*497] [**387] [***455] MR. JUSTICE MURPHY delivered the opinion of the Court.

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

[*498] On February 7, 1943, the tug "J. M. Taylor" sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately [***456] claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' [*499] Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made [**388] concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting en banc, held that the requested matters were not privileged. 4 F.R.D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners, forthwith "answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; [*500] state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting en banc, reversed the judgment of the District Court. 153 F.2d 212. It held that the information here sought was part of the "work product of the lawyer" and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts, n1 led us to grant certiorari. [***457] 328 U.S. 876.

-----Footnotes-----

n1 See cases collected by Advisory Committee on Rules of Civil Procedure in its Report of Proposed Amendments (June, 1946), pp. 40-47; 5 F.R.D. 433, 457-460. See also 2 Moore's Federal Practice (1945 Cum. Supp.), § 26.12, pp. 155-159; Holtzoff, "Instruments of Discovery under Federal Rules of Civil Procedure," 41 Mich. L. Rev. 205, 210-212; Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 301-307.

-----End Footnotes-----

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. n2 Inquiry into the issues and the facts before trial was [*501]narrowly confined and was often cumbersome in method. n3 The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow [**389] and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. n4

-----Footnotes-----

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

n2 "The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials." Sunderland, "The Theory and Practice of Pre-Trial Procedure," 36 Mich. L. Rev. 215, 216. See also Ragland, *Discovery Before Trial* (1932), ch. I.

n3 2 Moore's Federal Practice (1938), § 26.02, pp. 2445-2455.

n4 Pike and Willis, "The New Federal Deposition-Discovery Procedure," 38 Col. L. Rev. 1179, 1436; Pike, "The New Federal Deposition-Discovery Procedure and the Rules of Evidence," 34 Ill. L. Rev. 1.

-----End Footnotes-----

There is an initial question as to which of the deposition-discovery rules is involved in this case. Petitioner, in filing his interrogatories, thought that he was proceeding under Rule 33. That rule provides that a party may serve upon any adverse party written interrogatories to be answered by the party served. n5 The District Court proceeded [*502] on the same assumption in its opinion, although its order to produce and its contempt order stated that both Rules 33 and 34 were involved. [HN1] Rule 34 establishes a procedure whereby, upon motion of any party showing good cause therefor and upon notice to all other parties, the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, etc., not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control. n6

-----Footnotes-----

n5 [HN2] Rule 33 reads: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."

n6 [HN3] Rule 34 provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

-----End Footnotes-----

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

The Circuit Court of Appeals, [***458] however, felt that Rule 26 was the crucial one. Petitioner, it said, was proceeding by interrogatories and, in connection with those interrogatories, wanted copies of memoranda and statements secured from witnesses. While the court believed that Rule 33 was involved, at least as to the defending tug owners, it stated that this rule could not be used as the basis for condemning Fortenbaugh's failure to disclose or produce [*503] the memoranda and statements, since the rule applies only to interrogatories addressed to adverse parties, not to their agents or counsel. And Rule 34 was said to be inapplicable since petitioner was not trying to see an original document and to copy or photograph it, within the scope of that rule. The court then concluded that [HN4] Rule 26 must be the one really involved. That provides that the testimony of any person, whether a party or not, may be [**390] taken by any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence; and that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things. n7

-----Footnotes-----

n7 [HN5] The relevant portions of Rule 26 provide as follows:

"(a) WHEN DEPOSITIONS MAY BE TAKEN. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

"(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

-----End Footnotes-----

[*504] The matter is not without difficulty in light of the events that transpired below. We believe, however, that petitioner was proceeding primarily under Rule 33. He addressed simple interrogatories solely to the individual tug owners, the adverse parties, as contemplated by that rule. He did not, and could not under Rule 33, address such interrogatories to their counsel, Fortenbaugh. Nor did he direct these interrogatories either to the tug owners or to Fortenbaugh by way of deposition; Rule 26 thus could not come into operation. And it does not appear from the record that petitioner filed a motion under Rule 34 for a court order directing the production of the documents in question. [***459] Indeed, such an order could not have been entered as to Fortenbaugh since Rule 34, like Rule 33, is limited to parties to the proceeding, thereby excluding their counsel or agents.

[***HR1] [***HR2] [***HR3] Thus to the extent that petitioner was seeking the production of the memoranda and statements gathered by Fortenbaugh in the course of his activities as counsel, petitioner misconceived his remedy. Rule 33 did not permit him to obtain such memoranda and statements as adjuncts to the interrogatories addressed to the individual tug owners. A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney. But that is not this case. Here production was sought of documents prepared by a party's attorney after the claim has arisen. [HN6] Rule 33 does not make provision for such production, even when sought in connection with permissible interrogatories. Moreover, since petitioner was also foreclosed from securing them through an order under Rule 34, his only recourse was to take Fortenbaugh's deposition under Rule 26 and to attempt to force Fortenbaugh to produce the materials by use of a subpoena duces tecum in accordance with Rule 45. Holtzoff, "Instruments of Discovery under the Federal Rules of Civil Procedure," 41 Mich. L. Rev. 205, 220. [*505]

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

But despite petitioner's faulty choice of action, the District Court entered an order, apparently under Rule 34, commanding the tug owners and Fortenbaugh, as their agent and counsel, to produce the materials in question. Their refusal led to the anomalous result of holding the tug owners in contempt for failure to produce that which was in the possession of their counsel and of holding Fortenbaugh in contempt for failure to produce that which he could not be compelled [**391] to produce under either Rule 33 or Rule 34.

[***HR4] But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below. It matters little at this late stage whether Fortenbaugh fails to answer interrogatories filed under Rule 26 or under Rule 33 or whether he refuses to produce the memoranda and statements pursuant to a subpoena under Rule 45 or a court order under Rule 34. The deposition-discovery rules create integrated procedural devices. And the basic question at stake is whether any of those devices may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt. Nor does it relieve us of the responsibility of dealing with the problem raised by that attempt. It would be inconsistent with the liberal atmosphere surrounding these rules to insist that petitioner now go through the empty formality of pursuing the right procedural device only to reestablish precisely the same basic problem now confronting us. We do not mean to say, however, that there may not be situations in which the failure to proceed in accordance with a specific rule would be important or decisive. But in the present circumstances, for the purposes of this decision, the procedural [*506]irregularity is not material. Having noted the proper procedure, we may accordingly turn our attention to the substance of the underlying problem.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover [***460] the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with [*507] immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation [**392] confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

[***HR5] [***HR6] We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. n8 [HN7] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

inevitably arise when it can be shown [*508] that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule [***461] 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

-----Footnotes-----

n8 "One of the chief arguments against the 'fishing expedition' objection is the idea that discovery is mutual -- that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position." Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 303.

-----End Footnotes-----

[***HR7] We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that [HN8] the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

[***HR8] But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, nonprivileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all [*509] pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already [***393] through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts [***462] are used in these [*510] rules. n9 Here is simply [HN9] an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

-----Footnotes-----

n9 The English courts have developed the concept of privilege to include all documents prepared by or for counsel with a view to litigation. "All documents which are called into existence for the purpose -- but not necessarily the sole purpose -- of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production. . . . Thus all proofs, briefs, draft pleadings, etc., are privileged; but not counsel's indorsement on the outside of his brief . . . , nor any deposition or notes of evidence given publicly in open Court. . . . So are all papers prepared by any agent of the party bona fide for the use of his solicitor for the purposes of the action, whether in fact so used or not. . . . Reports by a company's servant, if made in the ordinary course of routine, are not privileged, even though it is desirable that the solicitor should have them and they are subsequently sent to him; but if the solicitor has requested that such documents shall always be prepared for his use and this was one of the reasons why they were prepared, they need not be disclosed." Odgers on Pleading and Practice (12th ed., 1939), p. 264.

See Order 31, rule 1, of the Rules of the Supreme Court, 1883, set forth in The Annual Practice, 1945, p. 519, and the discussion following that rule. For a compilation of the English cases on the matter see 8 Wigmore on Evidence (3d ed., 1940), § 2319, pp. 618-622, notes.

-----End Footnotes-----

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. [*511] Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, [**394] would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

[***HR9] [***HR10] We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be [***463] useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under [*512] such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted. n10

-----Footnotes-----

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

n10 Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents. See Report of Proposed Amendments by Advisory Committee on Rules of Civil Procedure (June, 1946); 5 F.R.D. 433.

-----End Footnotes-----

[HN10] Rule 30 (b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

[***HR11] But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account [*513] to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to [***395]the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, [***464] petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case. n11 It is a problem that rests on what [*514] has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

-----Footnotes-----

n11 See Report of Proposed Amendments by Advisory Committee on Rules of Civil Procedure (June, 1946), pp. 44-47; 5 F.R.D. 433, 459-460; Discovery Procedure Symposium before the 1946 Conference of the Third United States Circuit Court of Appeals, 5 F.R.D. 403; Armstrong, "Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments," 5 F.R.D. 339, 353-357.

-----End Footnotes-----

We therefore affirm the judgment of the Circuit Court of Appeals.

Affirmed.

CONCURBY: JACKSON

CONCUR: MR. JUSTICE JACKSON, concurring.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded "Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." The question is simply whether such a demand is authorized by the rules relating to various aspects of "discovery."

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked [*515] that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

"Discovery" is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, *Discovery Before Trial* (1932) 13-16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, amicus briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers [**396] who specialize in representing plaintiffs, because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. See Report of the Commission on the Administration of Justice in New York State (1934) [***465] 330-31; Ragland, *Discovery Before Trial* (1932) 35-36. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. Cf. Report of Commission on the Administration of Justice in New York State (1934) 41-42. [*516] It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to "set forth in detail the exact provision of any such oral statements or reports." Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, [*517] permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility -- perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not [***466] as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a [**397] biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to [*518] call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery, as fully as on the trial, to disclose his version of the facts. But that is his own disclosure -- it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. So the literal language of the Act of Congress which makes "any writing or record . . . made as a memorandum or record of any . . . occurrence, or event" admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. Cf. *Palmer v. Hoffman*, 318 U.S. 109, 111. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, "Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication." 318 U.S. at 114. We pointed out that there, as here, the "several hundred years of history behind the Act . . . indicate the nature of the reforms which it was designed to effect." [*519] 318 U.S. at 115. We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. *Palmer v. Hoffman*, 318 U.S. 109. Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on "showing good cause therefor" the court may order their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

329 U.S. 495, *; 67 S. Ct. 385, **;
91 L. Ed. 451, ***; 1947 U.S. LEXIS 2966

MR. JUSTICE FRANKFURTER joins in this opinion.

REFERENCES:

DEANE HILLSMAN, Plaintiff and Appellant, v. SUTTER COMMUNITYHOSPITALS OF SACRAMENTO,
Defendant and Respondent
Civ. No. 22590

Court of Appeal of California, Third Appellate District

153 Cal. App. 3d 743; 200 Cal. Rptr. 605; 1984 Cal. App.LEXIS 1821; 119 L.R.R.M. 2645

March 27, 1984

NOTICE:

[***1]

Certified for partial publication - See footnote 1, post, page 747.

PRIOR HISTORY:

Superior Court of Sacramento County, No. 268717, William M. Gallagher and Joseph A. DeCristoforo, Judges.

DISPOSITION: The judgment (order of dismissal) is reversed and the cause is remanded to the trial court for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff doctor appealed a judgment of the Superior Court of Sacramento County (California), which dismissed his complaint following a demurrer filed by defendant hospital, in plaintiff's action for breach of an employment agreement.

OVERVIEW: Plaintiff doctor and defendant hospital entered into a written employment contract. Plaintiff claimed defendant breached the employment agreement by terminating plaintiff's employment, and sued for damages. The trial court sustained defendant's general demurrer and then dismissed plaintiff's action; plaintiff appealed. The court reversed and held that plaintiff had sufficiently pleaded that he was terminated in violation of an implied contract with defendant. Although the court found nothing in the language of the employment agreement to rebut the presumption of Cal. Lab. Code § 2922, that plaintiff's employment was terminable at will by either party, it was implied in the agreement that plaintiff would not be terminated except in accordance with bylaws of the hospital, which provided giving grounds of discipline, notice and hearing. The court found that there was no conflict between plaintiff's implied contract theory and the express terms of the agreement, and could not conclude, as a matter of law, that the employment letter expressly excluded an implied agreement that plaintiff would be terminated according to the bylaws.

OUTCOME: The dismissal of plaintiff doctor's breach of contract action was reversed and the cause remanded for further proceedings because plaintiff sufficiently raised a claim that he had rights under defendant hospital's bylaws which were impliedly incorporated into his written employment contract.

CORE TERMS: termination, terminated, independent consideration, bylaws, pleaded, notice, lease, pulmonary, satisfactory, demurrer, therapy, terminable, laboratory, accomplished, mutually, chest, duties, letter agreement, implied-in-fact, lessor, implied contract, inhalation, bargained, pleasant, staff, specified term, permanent, repair, silent, rebut

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Appeals: Standards of Review: Standards Generally

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***; 119 L.R.R.M. 2645

[HN1] In an appeal arising from a judgment entered after the sustaining of a general demurrer, the appeals court must, under established principles, assume the truth of all properly pleaded material allegations of the complaint in evaluating the validity of the trial court's action.

Evidence: Procedural Considerations: Inferences & Presumptions

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN2] The general rule governing the duration of employment contracts is codified as Cal. Lab. Code § 2922, which provides that an employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period greater than one month. This statute creates a presumption that an employment contract is terminable at will. This presumption is subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that the relationship will continue for some fixed period of time. Or it may take the form of an agreement that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some cause for termination.

Contracts Law: Contract Interpretation: Interpretation Generally

[HN3] Ordinarily a written contract is sufficiently pleaded if it is set out in full or its terms alleged according to their legal effect. But if the instrument is ambiguous, the pleader must allege the meaning he ascribes to it. Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

[HN4] The rule on demurrer is simply a variation on the well-recognized theme that it is solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN5] An employee does not convert an at-will employment agreement into an agreement providing for termination-only-for-cause simply by showing that the employee left attractive prior employment in order to take a new job and therefore furnished the employer "independent consideration."

Contracts Law: Types of Contracts: Implied-in-Fact Contracts

[HN6] An employer may maintain rules or procedures related to the termination of employment which may form part of an implied contract of employment if the employer and employee had a mutual understanding that the rules or procedures will apply to the employee.

Contracts Law: Types of Contracts: Implied-in-Fact Contracts

[HN7] It is well settled that a covenant will not be implied against express terms or to supply a term on a matter as to which the contract is intentionally silent.

COUNSEL: Jerome Berg, Carolyn Morris and Linda L. Mallette for Plaintiff and Appellant.

Wendy S. Ball as Amicus Curiae on behalf of Plaintiff and Appellant.

Thomas A. Tweedy, William M. Briggs, McDonough, Holland & Allen, Gary F. Loveridge and Betsy S. Kimball for Defendant and Respondent.

JUDGES: Opinion by Sims, J., with Evans, Acting P. J., and Blease, J., concurring.

OPINIONBY: SIMS

OPINION: [*746] [**607] Plaintiff Deane Hillsman, M.D. appeals from an order and judgment dismissing his complaint entered after the trial court sustained defendant Sutter Community Hospitals' demurrers to plaintiff's first, second and third causes of action without leave to amend, and granted summary judgment for defendant on plaintiff's

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***; 119 L.R.R.M. 2645

fourth cause of action. On appeal plaintiff [*747] challenges only the sustaining of demurrers to the first and second causes of action. n1

-----Footnotes-----

n1 Pursuant to rule 976.1 of the California Rules of Court, the Reporter of Decisions shall publish all portions of this opinion except parts IV, V, and VI, which shall not be published.

-----End Footnotes-----

[**2]

Factual and Procedural Background

[HN1] "Because this appeal arises from a judgment entered after the sustaining of a general demurrer, we must, under established principles, assume the truth of all properly pleaded material allegations of the complaint in evaluating the validity of the trial court's action." (Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314].) The third amended complaint alleges in part:

On or about May 28, 1970, plaintiff and defendant entered into a written agreement under which plaintiff was to be employed as a full-time, hospital-based physician. n2 [*608] Plaintiff was to coordinate a comprehensive respiratory [*748] program, including a pulmonary laboratory, inhalation therapy, and chest physical therapy at Sutter General and Sutter Memorial Hospitals. The agreement allowed plaintiff to maintain a limited private medical practice in addition to his duties for defendant.

-----Footnotes-----

n2 A copy of the agreement was attached to the complaint and was incorporated in the complaint in its entirety. (See 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, §§ 315-318, pp. 1984-1987.) The agreement, termed a "letter of understanding," provided in full as follows: "May 28, 1970

"Deane Hillsman, M.D., Sutter Memorial Hospital, Sacramento, California

"Dear Dr. Hillsman:

"The following is put forth as a Letter of Understanding between the Sutter Community Hospitals and Deane Hillsman, M.D. regarding your employment as a full-time hospital-based physician.

"It is understood that you will coordinate a comprehensive respiratory program which will include the pulmonary laboratory, inhalation therapy, and chest physical therapy relating to in and out-patient services at both Sutter General and Sutter Memorial Hospitals. Of necessity, the main base of operation will be at the Sutter Memorial Hospital. A main purpose of this respiratory program is to make it available to any member of the practicing medical community who may refer patients for either investigation or therapy and be reasonably assured that these patients will receive good management by both medical and paramedical personnel. Because of the sensitive nature of hospital-based physicians, it is understood that cooperation with and incorporation of the interest and talents of the local medical community will be sought, particularly those practitioners of medical and surgical chest disease.

"Your duties as a pulmonary specialist will include the overall direction of the pulmonary laboratory and the expansion of its service capacity. These duties will also include the overall advising, coordinating, and consulting with regard to the inhalation therapy and the development of chest physical therapy service. It is anticipated that an active research and development program will eventually become a key part of the endeavor.

"It is further understood that compensation in the form of salary will be \$20,000 annually (\$1,667.00 per month). In addition, there will be a professional fee of \$5.00 payable to you for routine reports and \$10.00 for more extensive testing procedures. This will be charged to the hospital on a monthly basis. The basic fee for these respective services will be \$50.00 for a routine report and \$100.00 for the more extensive report respectively.

153 Cal. App. 3d 743, *; 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***; 119 L.R.R.M. 2645

"Also, it is understood that you will have the opportunity to practice private consultative chest medicine on a limited basis. A clinical and research association with you and the University of California at Davis and possibly the inhalation therapy school at American River College is understood. A prime objective will be to put the pulmonary therapy service and pulmonary laboratory on an economical sound basis at both Sutter General and Sutter Memorial. The income and expense of the pulmonary department both laboratory and therapy sections will be set up as a separate account and these figures made available to Dr. Hillsman for these purposes.

"It is further understood that renegotiation or termination of this letter of understanding by either party may be accomplished upon thirty days notice.

"We look forward to a long, pleasant, and mutually satisfactory relationship with you and the Sutter Community Hospitals.

"If this letter sets forth our understanding and agreement, please sign the enclosed copy of the letter and return to me.

"Very truly yours, /S/, Wm. A. Schaeffer, Executive Director

"The above correctly sets forth our understanding.

"/S/ Deane Hillsman, M.D." (Italics added.)

-----End Footnotes-----
[***3]

The agreement provided in part that "It is further understood that renegotiation or termination of this letter of understanding by either party may be accomplished upon thirty days notice. [para.] We look forward to a long, pleasant, and mutually satisfactory relationship with you and the Sutter Community Hospitals."

On or about August 31, 1973, defendant breached the employment agreement by terminating plaintiff's employment. It is alleged that plaintiff's termination was contrary to an implied promise that defendant would be terminated only as provided in defendant's bylaws. It is alleged further that "defendant promised plaintiff a long, pleasant, and mutually satisfactory relationship with" defendant, and that plaintiff, "In reliance upon the representations [made] by defendant . . . and as a bargained for element of such agreement" agreed to leave the clinic where he was formerly employed and where he expected substantial benefits, including tenure, salary increases, and senior staff status. Plaintiff pleads entitlement to damages in excess of \$350,000.

Plaintiff's second cause of action pleaded a common count for the value of services rendered by plaintiff at the[***4] request of defendant.

Plaintiff posits various legal theories in support of his pleading, including contentions his termination was barred by (1) an express covenant in the letter of understanding; (2) his furnishing of "independent consideration" for the agreement in the form of his detrimental reliance in leaving his prior position of employment and its associated benefits; and (3) an implied contractual provision that plaintiff would not be terminated except in accordance with bylaws of the hospital providing for grounds of discipline, notice and [*749]hearing. We conclude plaintiff's third contention has merit so that we reverse the judgment of dismissal.

Discussion

I

A

[HN2] We note at the outset the general rule governing the duration of employment contracts, codified as Labor Code section 2922: "An employment, having no specified term, may be terminated at the will of either party on notice to the

153 Cal. App. 3d 743, *; 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***, 119 L.R.R.M. 2645

other. Employment for a specified term means employment for a period greater than one month." (See *Tameny v. Atlantic Richfield Co.*, supra, 27 Cal.3d at p. 172; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 295 [188 Cal.Rptr. 159].) This statute creates[***5] a presumption that an employment contract is terminable at will. (*Pugh v. Sees's Candies, Inc.* (1981) 116 Cal.App.3d 311, 324 [171 Cal.Rptr. 917].) n3 This presumption "is subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that the relationship will continue for some fixed period of time. Or . . . it may take the form of an agreement that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some 'cause' for termination." (*Id.*, at pp. 324-325, fn. omitted.)

-----Footnotes-----

n3 Pugh makes it clear the presumption is one of producing evidence. (See Pugh, supra, 116 Cal.App.3d at pp. 329-330.)

-----End Footnotes-----

[**609] B

Although appellant's brief is not entirely clear, it appears he first contends the presumption of at-will employment is sufficiently rebutted by his pleading of an explicit contractual promise that his employment[***6] would be terminated only for cause. He argues the letter of understanding contains the express promise on which he relies.

Here the letter agreement was pleaded in its entirety by attachment to the complaint. (See fn. 2, ante.) [HN3] "Ordinarily a written contract is sufficiently pleaded if it is set out in full or its terms alleged according to their legal effect But if the instrument is ambiguous, the pleader must allege the meaning he ascribes to it. [Citations.]" (3 Witkin, op. cit. supra, Pleading, § 402, p. 2059.) Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege [*750]that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach. n4 (See *Sweet v. Vista Irrigation Dist.* (1933) 134 Cal.App. 518, 520-521 [25 P.2d 512]; 3 Witkin, op. cit. supra, Pleading, § 320, p. 1988, § 402, pp. 2059-2060; compare *Coast Bank v. Minderhout* (1964) 61 Cal.2d 311, 314-315 [38[***7] Cal.Rptr. 505, 392 P.2d 265].) Since plaintiff has not pled that the language of the letter-agreement is subject to any special meaning, we construe the language itself.

-----Footnotes-----

n4 [HN4] The rule on demurrer is simply a variation on the well-recognized theme that "It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]; *Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 591 [177 Cal.Rptr. 268].)

-----End Footnotes-----

Plaintiff locates an express promise of employment terminable only for cause in the penultimate paragraph of defendant's letter of understanding, which recites that "We look forward to a long, pleasant, and mutually satisfactory relationship with you and the Sutter Community Hospitals." Plaintiff apparently contends the foregoing language contained a promise of "permanent" employment for a term[***8] of more than one month, so that the contract is not one falling within Labor Code section 2922. Plaintiff implicitly argues that since defendant allegedly promised employment for a term more than one month, plaintiff could be terminated only if he failed to perform his agreed duties satisfactorily. However, it is immediately apparent that the language relied on by plaintiff expresses a mere hope or expectation rather than a promise. For example, defendant could not promise a "mutually satisfactory" relationship

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***; 119 L.R.R.M. 2645

because it had no control over plaintiff's conduct and could not guarantee that plaintiff's performance would be satisfactory; only plaintiff could do that. Plaintiff's interpretation twists defendant's polite closing salutation far beyond its obvious purpose, which was simply to add a touch of personal warmth to an otherwise businesslike letter. The foregoing language did not promise plaintiff employment for a specified term of more than one month. n5

-----Footnotes-----

n5 Plaintiff also points to language of the letter referring to the nature of plaintiff's duties, including "overall direction of the pulmonary laboratory." Plaintiff argues this language implies plaintiff has contracted to perform certain tasks and that the duration of the agreement must be commensurate with the time required to complete such tasks. We find nothing in the agreement indicating plaintiff was to complete the tasks referred to. The agreement simply defines what plaintiff was to do while employed, not how long he was to do the agreed tasks.

-----End Footnotes-----

***9]

The letter agreement also provides, "It is further understood that renegotiation or termination of this letter of understanding by either party may be accomplished upon thirty days notice." Plaintiff suggests the 30-day [*751] clause merely imposes a 30-day notice requirement before terminating the agreement for cause. However, this language is silent with respect to whether [*610] the agreement shall be terminable with or without cause. Accordingly, we find nothing in the language of the agreement to rebut the presumption of Labor Code section 2922 that plaintiff's employment was terminable at will by either party. The agreement contains no express promise of employment terminable only for cause.

II

Relying principally on *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91 [127 Cal.Rptr. 222], plaintiff next contends he furnished consideration independent of the services to be performed by the employee for his prospective employer and the furnishing of this independent consideration bars his termination except for cause. The independent consideration alleged by plaintiff is that he left his medical practice at a clinic and gave up expected [*10]tenure, salary increases, senior staff status, security, and other employment prospects.

In *Rabago-Alvarez*, plaintiff left employment selling copper gift ware and went to work for a division of Dart Industries, Inc. (Dart). Representatives of Dart assured plaintiff her position would be permanent as long as her work efforts were satisfactory and that she would never be terminated arbitrarily but only for cause if she failed to perform her work and assignments. (*Id.*, at pp. 94-95.) Her employment with Dart was terminated after she was taken by her boss to view some topless and bottomless entertainment and insisted on leaving. (*Id.*, at p. 95.) A jury awarded damages for wrongful termination of employment and the Court of Appeal affirmed. (*Ibid.*) The court's opinion contained the following unfortunate language: "It is settled that contracts of employment in California are terminable only for good cause if either of two conditions exist: (1) the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer; or (2) the parties agreed, expressly or impliedly, that the employee could be terminated only [*11]for good cause." (*Id.*, at p. 96.)

As stated by *Rabago-Alvarez*, the foregoing rule can easily lead to the incorrect conclusion (advanced here by plaintiff) that the presence of "independent consideration" is sufficient, even in the absence of an express or implied agreement, to require that an employee be fired only for cause. (See, e.g., *Strauss v. A. L. Randall Co.* (1983) 144 Cal.App.3d 514, 517 [194 Cal.Rptr. 520].)

The "independent consideration" rule of *Rabago-Alvarez* was correctly analyzed by Justice Grodin in *Pugh v. See's Candies, Inc.*, supra, 116 [*752] Cal.App.3d at pages 325-326. Prior to *Pugh*, cases had required an employee to show that he or she furnished consideration to the employer, independent of employment services, in order for the employee to enforce the employer's promise of termination only for cause. (See, e.g., *Ruinello v. Murray* (1951) 36 Cal.2d 687, 689 [227 P.2d 251]; *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 39 [172 P.2d 867]; *Levy v. Bellmar Enterprises* (1966) 241 Cal.App.2d 686, 690 [50 Cal.Rptr. 842]; *Ferreira v. E. & J. Gallo Winery* (1964) 231

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***, 119 L.R.R.M. 2645

Cal.App.2d [***12]426, 430 [41 Cal.Rptr. 819].) As Pugh points out, these cases reasoned that since the employee did not promise to quit only for cause, the employer could not be held to a promise to terminate only for cause unless the employee furnished the employer consideration independent of employment services themselves. (Pugh, supra, 116 Cal.App.3d at p. 325.) In line with this doctrine, and following Millsap v. National Funding Corp. (1943) 57 Cal.App.2d 772, 776 [135 P.2d 407], Rabago-Alvarez found independent consideration for Dart's assurances of termination only for cause in plaintiff's act of leaving her prior permanent employment. (Rabago-Alvarez, supra, 55 Cal.App.3d at p. 96.)

In Pugh Justice Grodin concluded the rule of "independent consideration" represented an unwarranted application of the doctrine of mutuality of obligation: "A contract which limits the power of the employer [***611] with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit his employment. 'If the requirement of consideration is met, there is no additional requirement of . . . equivalence[***13] in the values exchanged, or "mutuality of obligation.'" (Rest.2d Contracts, § 81 (Tent. Draft No. 2, 1965); 1A Corbin on Contracts (1963) § 152, pp. 13-17; see Chinn v. China Nat. Aviation Corp. (1955) 138 Cal.App.2d 98 [291 P.2d 91]; Toussaint v. Blue Cross & Blue Shield of Mich. (1980) 408 Mich. 579, 600 [292 N.W.2d 880, 885].)" (Pugh v. See's Candies, Inc., supra, 116 Cal.App.3d at p. 325.)

The Pugh court relegated the notion of independent consideration to an evidentiary function, as tending to show the presence of an agreement: "it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service." (Id., at p. 326.)

Rabago-Alvarez's statement of the rule of "independent consideration" is thus doubly flawed. The case first assumed incorrectly an employee had to show consideration separate from employment services in order to enforce a contract providing for termination for cause. The case then took the discredited doctrine of "independent consideration" [***14] (formerly necessary to [*753]enforce a contract providing for termination for cause) and made the doctrine a substitute for the contract itself.

As we have seen, Rabago-Alvarez, which itself involved express oral promises, cannot properly be read as dispensing with the requirement that termination for cause be found in an express or implied contract or in considerations of public policy. n6 Thus, [HN5] an employee does not convert an at-will employment agreement into an agreement providing for termination-only-for-cause simply by showing that the employee left attractive prior employment in order to take a new job and therefore furnished the employer "independent consideration."

-----Footnotes-----

n6 Other cases relied upon by plaintiff also reflect express promises by the employer that employment would be permanent or termination would be only for cause. (See, e.g., Millsap v. National Funding Corp., supra, 57 Cal.App.2d at p. 775; Ryan v. Upchurch (S.D.Ind. 1979) 474 F.Supp. 211, 213.) Chinn v. China Nat. Aviation Corp. (1955) 138 Cal.App.2d 98 [291 P.2d 91], also cited by plaintiff, did not address the question of whether plaintiff could be terminated only for cause; the case concerns plaintiff's entitlement to employment benefits.

-----End Footnotes-----

[***15]

III

We next consider whether plaintiff pleaded facts sufficient to rebut the presumption of at-will employment in Labor Code section 2922 by alleging an implied-in-fact promise that plaintiff would not be terminated except upon grounds and according to procedures set forth in the hospital's bylaws. (See Pugh v. See's Candies, Inc., supra, 116 Cal.App.3d at p. 327; see also Marvin v. Marvin (1976) 18 Cal.3d 660, 684 [134 Cal.Rptr. 815, 557 P.2d 106].)

"In determining whether there exists an implied-in-fact promise for some form of continued employment courts have considered a variety of factors These have included, for example, the personnel policies or practices of the

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***, 119 L.R.R.M. 2645

employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." (Pugh, supra, 116 Cal.App.3d at p. 327, fns. omitted.)

[HN6] An employer may maintain rules or procedures related to the termination of employment which may form part of an implied contract of employment if the employer and employee had a mutual understanding that the rules or procedures[***16] would apply to the employee. (Perry v. Sindermann (1972) 408 U.S. 593, 601 [33 L.Ed.2d 570 [579, 92 S.Ct. 2694]; Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 207 [124 Cal.Rptr. 14, 539 P.2d 774]; Walker v. [**612] Northern San Diego County Hospital Dist. (1982) 135 Cal.App.3d 896, 902-905 [185 Cal.Rptr. 617].)

[*754] Defendant suggests that the doctrine of implied-in-fact covenants is inapplicable on the instant facts because an implied-in-fact covenant of nontermination except as provided in the bylaws would contradict an express provision of the letter of understanding allowing termination-at-will. (See Witt v. Union Oil Co. (1979) 99 Cal.App.3d 435, 441 [160 Cal.Rptr. 285]; Wal-Noon Corp. v. Hill (1975) 45 Cal.App.3d 605, 613 [119 Cal.Rptr. 646]; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 580, p. 497.)

[HN7] It is well settled that "A covenant will not be implied against express terms or to supply a term on a matter as to which the contract is intentionally silent." (Witt v. Union Oil Co., supra, 99 Cal.App.3d at p. 441, quoting 1 Witkin, Summary of Cal. Law, op. cit. supra, Contracts, [***17] § 580, p. 497 (italics added); see Tanner v. Title Ins. & Trust Co. (1942) 20 Cal.2d 814, 824 [129 P.2d 383].) In Wal-Noon Corp. v. Hill, supra, 45 Cal.App.3d 605, we explained that "where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." (Id., at p. 613.)

Both Witt and Wal-Noon are distinguishable. In Witt, for example, plaintiff leased a service station pursuant to a lease with an oil company that provided for a fixed term of three years with termination of the lease occurring automatically and without notice at the end of the third year. (Witt v. Union Oil Co., supra, 99 Cal.App.3d at p. 437.) Plaintiff filed a complaint contending, inter alia, defendant's termination of the lease on the date specified in the lease violated an implied covenant of good faith. However, the Court of Appeal upheld the sustaining of a demurrer without leave to amend on the ground the explicit terms of the lease controlled. ([***18] Id., at p. 441.) Implicit in plaintiff's argument was the assumption he had an implied right to possession of the premises beyond a three-year term. That contention, however, was in direct conflict with the explicit provision in the lease limiting his term to three years.

Similarly, in Wal-Noon Corp. v. Hill, supra, 45 Cal.App.3d 605, plaintiffs, lessees of a building, replaced the roof of the leased premises at their expense without notice to the lessor and then brought suit to collect the roofing expense from the lessor. (Id., at p. 609.) The lease contained a clause obligating the lessor to make repairs and we concluded that "notice as a condition precedent to the lessors' obligation to repair is . . . clearly apparent from the terms of the written lease" (Id., at p. 612.) We therefore rejected plaintiff's contention it should recover on a quasi-contractual theory of money paid by mistake, since that theory "would effectively [*755] deprive defendants of part of the bargained-for consideration of the lease, i.e., the right of control over repairs for which they are therein held responsible." (Id. at p. 613.)

In the instant case, there is[***19] no readily ascertainable conflict between plaintiff's implied contract theory and the express terms of the letter of understanding. The salient language of the letter agreement simply provides that "termination of this letter of understanding by either party may be accomplished upon thirty days notice." Unlike Witt, supra, plaintiff does not challenge an express time-frame set forth in the agreement. He does not contend, for example, that he was entitled to 40 or 60 days notice of termination. Rather, he challenges the grounds and procedures by which termination could be effected. With respect to that question the letter presents a lacuna. It does not state, for example, that termination of the agreement could be accomplished "for any reason" or "at will" or "without cause" or "without a hearing." Therefore, unlike the [**613] situation in Wal-Noon, the agreement does not expressly preclude plaintiff's pleaded assertion that termination was to be in accordance with the hospital's bylaws. In part I, ante, we pointed out that the letter's failure to refer to termination-for-cause created an evidentiary void insufficient to rebut the presumption of employment[***20] at will. We now conclude the same void in contract language cannot be used to defeat plaintiff's expressly pleaded theory of implied contract.

153 Cal. App. 3d 743, *, 200 Cal. Rptr. 605, **;
1984 Cal. App. LEXIS 1821, ***, 119 L.R.R.M. 2645

It may be, of course, that the evidence will show the parties bargained for termination-without-cause and that "the contract is intentionally silent" (Witt, supra, 99 Cal.App.3d at p. 441) with respect to any cause required for termination. On review of an order sustaining a demurrer, however, we take the language of the letter agreement on its face (see Sweet v. Vista Irrigation Dist., supra, 134 Cal.App. at pp. 520-521); we cannot say as a matter of law the letter expressly excludes an implied agreement that plaintiff would be terminated according to the bylaws.

Defendant argues the bylaws themselves show that the procedures set forth therein apply only to a revocation of staff privileges at the hospital and not to the termination of a supervisory employee. Once again, however, defendant asks that we exceed the proper scope of review of an order sustaining a demurrer. Plaintiff pleaded he was terminated in violation of the bylaws. Although plaintiff attached excerpts from the bylaws to his complaint, the excerpts merely[***21] describe grounds and procedures for discipline; they do not exclude application of the bylaws to termination of a supervisory employee. Defendant's brief refers to matters in the trial court indicating the bylaws apply only to revocation of staff privileges. That reference, it turns out, is to defendant's memorandum of points and authorities in support of the demurrer. Allegations in a memorandum of points and [*756] authorities may not contravene properly pleaded facts. (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 797, pp. 2410-2411.)

Since plaintiff has sufficiently pleaded he was terminated in violation of an implied contract with defendant, the judgment of dismissal must be reversed.

IV-VI [Text omitted.] NOT CERTIFIED FOR PUBLICATION.

The judgment (order of dismissal) is reversed and the cause is remanded to the trial court for further proceedings.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1805, AFL-CIO v. HENRY C. MAYO
No. 126, September Term, 1976

Court of Special Appeals of Maryland

35 Md. App. 169; 370 A.2d 130; 1977 Md. App. LEXIS 465; 94L.R.R.M. 3126

March 9, 1977, Decided

SUBSEQUENT HISTORY: [***1]

Certiorari Granted, Court of Appeals of Maryland, June 1, 1977.

PRIOR HISTORY:

Appeal from the Circuit Court for Anne Arundel County; Childs, J.

DISPOSITION: Judgment affirmed. Appellant to pay costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant local union appealed from the judgment of the Circuit Court for Anne Arundel County (Maryland), which denied a motion for judgment notwithstanding the verdict and confirmed an award against it for compensatory damages of \$1.00 and punitive damages of \$5,000.00 in plaintiff supervisor's action against it for defamation.

OVERVIEW: The supervisor filed suit against the local union and ten individuals, all associated with the local and some also associated with the union newspaper. The supervisor claimed all of the defendants published a defamatory statement about him, and conspired to injure him. The case was tried before a jury and the trial judge, at the close of the supervisor's evidence, granted defendants' motions for directed verdict as to the conspiracy count and as to all of the individual defendants on the defamation count. The jury then granted the supervisor's claim against the local union for nominal compensatory damages, and punitive damages. On appeal, the court affirmed the trial court because the local union had admitted the defamation and relied on qualified privilege as a defense. There was evidence on the record, and the issue of malice was a jury question properly submitted to it. Nominal compensatory damages supported an award of punitive damages.

OUTCOME: The court affirmed the judgment of the trial court jury that determined that the local union was liable to the supervisor for defamation, and the award of \$1.00 in compensatory damages and \$5,000.00 in punitive damages.

CORE TERMS: qualified privilege, conditional privilege, libel, punitive damages, time card, grievance, defamation, compensatory damages, vacation, weekly, malice, common law, actual malice, exceeded, actual injury, recollection, supervisor, reputation, forfeited, abused, falsified, plant, reckless disregard, loss of reputation, vacation time, matter of law, consequent, awaiting, falsity, card

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Defamation Actions

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN1] A finding of conditional privilege conditionally negates the presumption of malice and shifts the burden to the plaintiff to show actual malice. Malice may be a jury question. It is a question for the court whether the statement if made in good faith and without malice is thus privileged. But the plaintiff has the right notwithstanding the privileged character of the communication to go to the jury, if there be evidence tending to show actual malice. Absent a finding of express malice, a conditional privilege, if not abused, defeats the libel action.

35 Md. App. 169, *; 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***; 94 L.R.R.M. 3126

Torts: Damages: Compensatory Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] In libel per se, damage to reputation is presumed. In awarding compensatory damages, however, a jury should look to evidence of actual injury. The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. Actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

Torts: Damages: Punitive Damages

Torts: Damages: Compensatory Damages

[HN3] To allow punitive damages where only a technical invasion of the plaintiff's rights existed would permit recovery of damages when, in fact, no compensable injury was proved. To support an award of punitive damages in Maryland there must first be an award of at least nominal compensatory damages.

COUNSEL: Ann F. Hoffman, with whom were Bernard W. Rubenstein and Edelman, Levy & Rubenstein, P.A. on the brief, for appellant.

John A. Blondell, for appellee.

JUDGES: Morton, Powers and Mason, JJ. Powers, J., delivered the opinion of the Court.

OPINIONBY: POWERS

OPINION: [*170] [**131] Changes made by Henry C. Mayo, an Inspection Supervisor at a plant of Westinghouse Electric Corporation in Anne Arundel County, on the weekly time card of an employee under his supervision, [***3] constituted the first of a series of events which resulted in this appeal.

It is something of an anomaly that the merits of the original dispute -- whether the supervisor's action was right or wrong -- have no bearing on the issues in this case. It is necessary, however, that we set out the facts as they occurred, in order to understand, in their proper perspective, the issues which later developed.

On Saturday, 20 October 1973, W. A. Sparks, an Inspector employed at Westinghouse, turned in his weekly time card to Mayo, his supervisor. It was the supervisor's duty to verify that hours worked and absent time were properly reported, sign his approval, and forward the time card to payroll. The card turned in by Sparks showed that he worked 8.0 hours on Monday, Tuesday, Friday and Saturday of that week. By using the Absence Symbol "C", Sparks classified his absences on Wednesday and Thursday as vacation days. Mayo gave the card back to Sparks, telling him to correct it, because Wednesday and Thursday had not been authorized as vacation time, and must be classified as voluntary absences. n1 Sparks returned the time card, unchanged. Mayo [*171] consulted his superior, John Brothers, [***4] Manager of Quality Control. Brothers instructed Mayo to change the Absence Symbol from "C" to "A", indicating voluntary absence. Mayo made the changes, and then approved and forwarded the time card.

-----Footnotes-----

n1 It appears that if the absences were authorized vacation, the Saturday work was overtime, at a higher rate of pay. If the days off were voluntary absences, the Saturday work was at straight time. There was evidence that it was the company's position that vacation time was required to be scheduled in advance, and not after the fact, but that the union contended that an employee was entitled, after the fact, to classify an absent day as vacation time. The issue was then under dispute between the company and the union.

35 Md. App. 169, *, 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***, 94 L.R.R.M. 3126

-----End Footnotes-----

Sparks, a member of International Brotherhood of Electrical Workers, Local 1805, AFL-CIO, consulted Lenora Brach, his union steward. She presented two Grievances, signed by Sparks as the aggrieved employee and by her as steward. The descriptions of the grievances were as follows:

"Grievance[***5] Serial # 3680 I

Management did violate company rule number 11, altering or falsifying company documents. On October 24th 1973 Mr. H. Mayo foreman of Inspection on second shift under his Superior Mr. J. Brothers instructions did falsify employee W. Sparks IBM weekly time card by changing a C absence (vacation day) to an A absence for October 17th and 18th 1973, without employee W. Sparks permission.

The Union has had several cases where employees have falsified company documents and were suspended. The Union contends that Management has no right in violating company rule number 11 than does the employees, and that W. Sparks IBM weekly time card be [***132] changed back to a C absence instead of an A absence."

"Grievance Serial # 3681 I

Management is in violation of Article Nine Section Four (e), in not paying W. Sparks time and one half for working Saturday October 20, 1973. [*172] Management changed his weekly IBM card from C (vacation day) to A (absent day).

This the Union will not tolerate. W. Sparks time card must be changed to show a C absence (vacation day) for October 17th and 18th instead of an A absence, so he will be qualified for overtime pay for[***6] eight hours on Saturday the 20th of October."

After they were filed, the grievances received consideration at various steps or levels as prescribed in the established grievance procedure.

In the November 1973 issue of "Intercom", a newspaper owned and published by Local 1805, the following were among a number of items published under the heading, "Grievance Report":

"3681I -- L. Brach 2nd Shift

Supervisor H. Mayo falsified employee's I.B.M. Weekly Time Card. Is a violation of Company plant rule # 11. Submitted to the second step on 10-31-73, awaiting meeting."

"3680I -- L. Brach 2nd Shift

Management violated Art. IX, Section 4 (e) in not paying aggrieved time and a half for Saturday, 10-20-73. His weekly I.B.M. time card was changed from vacation (C) to absent (A) days. Submitted to the second step 10-31-73, awaiting meeting."

We set forth both grievances, and both news items, not only because of the significance as an issue in the case of the difference between the grievance as actually stated and the news report of the grievance, but because it is apparent that the news report erroneously switched the two grievance numbers. This transposition[***7] error is of no importance, but we take note of it to avoid possible confusion.

There was evidence that at a December 1973 meeting between management officials and union officials, for the so-called third step of the grievance procedure, the management officials explained that the information in the [*173]"Intercom" "had terribly upset Mr. Mayo", and asked if it could in some way be retracted or changed. The request was made to Mr. Bailz Elza, vice-president of Local 1805, an assistant editor of "Intercom". He was also asked to consider rewriting the grievance "so that we could settle the issue, the real issue", and it would not be printed in such a manner in the "Intercom". He did not agree. The next issue of "Intercom", April 1974, printed the item:

"3681I -- L. Brach 2nd Shift

35 Md. App. 169, *, 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***, 94 L.R.R.M. 3126

Supervisor falsified employee's I.B.M. Weekly Time Card. In violation of Company plant rule # 11. Requested 4th step 3-14-74."

In October 1974 Mayo filed a suit in the Circuit Court for Anne Arundel County against International Brotherhood of Electrical Workers, Local 1805, AFL-CIO and ten individuals, all associated with Local 1805 and some also associated with the newspaper[***8] Intercom. The declaration contained two counts. In the first Mayo alleged that all of the defendants published a defamatory statement about him as follows:

"Page Two -- Intercom -- November 1973

Grievance Report

3681I -- L. Brach 2nd Shift

Supervisor H. Mayo falsified employee's I.B.M. Weekly Time Card. Is a violation of Company plant rule # 11. Submitted to the second step on 10-31-73, awaiting meeting."

In the second count he incorporated the allegations of the first count, and alleged [**133] that the defendants acted jointly and in concert with one another.

All defendants joined in a single responsive pleading entitled "Answer To Declaration", in which they pleaded "That they did not commit the wrongs alleged."

The case was tried before a jury and Judge E. Mackall Childs on 25 and 26 September 1975. At the close of the [*174] plaintiff's evidence the defendants moved for a directed verdict. The motion was granted as to the second, or conspiracy, count, and it was also granted as to all of the individual defendants, leaving only the claim against Local 1805, as set forth in the first count of the declaration.

Upon completion[***9] of the defendant's evidence, the court instructed the jury, objections to the instructions were noted, and counsel made their arguments to the jury. A verdict was returned in favor of Mayo against Local 1805 for compensatory damages of \$1.00 and punitive damages of \$5,000.00. A motion for judgment n.o.v. was made and denied. Judgment was entered on the verdict. This appeal was taken.

Appellant presents these questions:

1. Did Appellant enjoy a qualified privilege as a matter of law to publish the alleged libel?
2. Was there competent evidence to support an award of compensatory damages?
3. Does an award of \$1.00 in compensatory damage support an award of \$5,000 punitive damages?
4. Did the Court commit reversible error in instructing the jury that it could infer that Appellant sought to have Appellee discharged?

Qualified Privilege

Appellant argues that the court erred in failing to instruct the jury that it had a qualified privilege as a matter of law to publish the alleged libel. The argument is one of semantics, not of substance.

It would be unnecessarily repetitive for us to undertake an extensive discussion of the qualified, or conditional privilege, as it is[***10] recognized in the law of defamation. That privilege was one of several aspects of libel and slander which were reexamined by the Court of Appeals, in the light of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), in its opinion in *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976). After having [*175] adopted negligence as the standard to be applied in Maryland in cases of purely private defamation, 276 Md. at 596, the Court said, at 598:

35 Md. App. 169, *, 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***; 94 L.R.R.M. 3126

"It has been suggested that adoption of the negligence standard of fault in defamation cases would have the practical effect of rendering obsolete the common law defense of conditional privilege. See, e.g., Anderson, supra, 53 Texas L. Rev. at 443, n. 97; Frakt, supra, 6 Rutgers-Camden L. J. at 496-97. The reasoning which underlies this position is that many jurisdictions follow the rule that one of the means by which a conditional privilege may be defeated is by proving negligence on the part of the defendant. F. Harper & F. James, supra, § 5.27; W. Prosser, supra, § 115."

The Court rejected that reasoning. It said, at 598-99:

"In Maryland, however, [***11] we have never held that negligence is among the grounds on which the conditional privilege may be forfeited.

"The Maryland cases on abuse of conditional privilege are couched in terms of 'express malice' or 'actual malice.'"

* * *

"Express or actual malice represents something more than conduct that is merely negligent."

Referring to its definition of malice found in *Stevenson v. Baltimore Club*, 250 Md. 482, 243 A. 2d 533 (1968), and *Orrison v. Vance*, 262 Md. 285, 277 A. 2d 573 (1971), [**134] the Court said, in *Jacron*, at 600:

"* * * thus the reckless disregard standard now appears to be firmly established in Maryland as a test, albeit not the exclusive test, for abuse of a conditional privilege. This being a higher standard than negligence, we retain the common law conditional privilege in Maryland which, in a given [*176] case may suffice to avoid liability even though the Gertz standard regarding falsity and defamation is met by the plaintiff."

* * *

"While the question of whether a defamatory communication enjoys a conditional privilege is one of law for the court, whether it has been forfeited by malice is usually a question for [***12] the jury."

The net result of what the Court said in *Jacron* about the common law conditional privilege in Maryland was that the law remained the same. The respective functions of the court and jury could be paraphrased thus:

In a libel or slander trial, the judge decides whether a defendant has the privilege when he walks into the courtroom; the jury decides whether he still has it when he walks out.

The fallacy in appellant's argument is that it contends that it "enjoyed a qualified privilege to print the item in question, even if it were libelous", and that the judge should have told the jury that this was so as a matter of law. Of course, such an instruction would have amounted to directing a verdict for the defendant, something that the court was not asked, by appropriate motion at the close of all the evidence, Rule 552, to do. Also, it would have ignored the existence of several factual issues, which the court should have, and did, submit to the jury.

In another recent case, *Hanrahan v. Kelly*, 269 Md. 21, 305 A. 2d 151 (1973), the Court of Appeals considered the defense of conditional or qualified privilege. Copies of a letter which defamed the addressee [***13] had been sent to several other persons, who may have shared with the writer, a mutual interest in the subject matter. Also, the letter had been seen by the writer's office personnel. The opinion cited several earlier cases which defined the privilege, and quoted several of the definitions. It said, at 29-30:

"The general rules governing all conditional [*177] privileges are, however, well-settled. [HN1] A finding of conditional privilege conditionally negates the presumption of malice and shifts the burden to the plaintiff to show actual malice. *Peurifoy v. Congressional Motors, Inc.*, 254 Md. 501, 255 A. 2d 332 (1969). Malice may be a jury question. As stated in *Fresh v. Cutter*, 73 Md. 87, 93-94, 20 A. 774, 775 (1890):

35 Md. App. 169, *; 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***; 94 L.R.R.M. 3126

"It is a question for the Court whether the statement if made in good faith and without malice is thus privileged. But the plaintiff has the right notwithstanding the privileged character of the communication to go to the jury, if there be evidence tending to show actual malice * * *."

* * *

"Absent a finding of express malice, a conditional privilege, if not abused, defeats the libel action. *Wetherby v. Retail Credit Co.*, 235 Md. 237, [***14]241, 201 A. 2d 344, 347 (1964)."

The Court's conclusion on that issue was stated at 31-32. It said:

"* * * in light of all the evidence, we find that there was a factual question as to the existence of a qualified privilege for Blankstein, Adler, Solomon, McManus, and Antonelli sufficient to go to the jury, and that the jury was properly instructed."

A careful reading of the instructions given by Judge Childs in the case before us shows that there was no departure from the principles of *Jacron* (which had not yet been decided), *Hanrahan*, and the earlier [**135] decisions of the Court of Appeals. He told the jury that the "law has found it proper to afford a Union or a group of people who have a common interest, what is known as the qualified privilege", n2 [*178] and later said, "you may find or you may not find that there was a qualified privilege for the Union to say what it did in the *Intercom*, or you may find it went too far." The court also said, with respect to the extent to which some 2,000 copies of the paper were circulated, "it's up to you to determine whether or not this privilege was exceeded, and it is up to you to determine whether[***15] or not the one original publication and the additional publication exceeded the qualified privilege which may have existed between the Union, itself, and the Union members."

-----Footnotes-----

n2 Appellant does not contend that qualified privilege was not sufficiently defined.

-----End Footnotes-----

The instruction also submitted to the jury on the evidence, questions of actual malice, ill will, and publication with knowledge of falsity, or with reckless disregard of whether they were true or false, none of which was the subject of objection.

The evidence in this case was sufficient to permit the jury to find that the privilege was exceeded, by the extent to which the publication was disseminated, or that it was forfeited because it was abused.

It is entirely clear to us that when the trial judge in this case told the jury that it may find or may not find that there was a qualified privilege for the Union to say what it did, and when the Court of Appeals in *Hanrahan* said that there was a factual question as to the existence of a qualified privilege, [***16] the question was whether a privilege, conceded at the outset, still prevailed in the face of evidence that it was exceeded or abused.

There was no reversible error in the instructions relating to qualified privilege.

Compensatory Damages

The objection noted by the appellant to the instructions as they related to damages was as follows:

"The second objection is on the question of damages, as I understand the case, it was loss of reputation and consequent damages. We felt that [*179] there was no evidence of loss of reputation, therefore, there could be no consequent damages. The consequent damages, as I understand it, has to relate back to some other loss, such as loss of reputation, and not that he felt and believed by the publication, not his own personal objection to the publication, but the reaction of

35 Md. App. 169, *; 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***; 94 L.R.R.M. 3126

others to the publication, which led to mental suffering and so on. And, therefore, we don't think that the jury has been properly instructed on that and we would urge that there have been proven, in fact, no damages that are compensable at all."

In effect, appellant's position, as preserved below and as argued here, is that the sine qua non in a defamation[***17] case is evidence of actual damage to reputation, and that no other element of damage may be considered unless it is shown to flow from the proven damage to reputation.

What the "Intercom" said about Mayo was a libel per se. It imputed to him misconduct related to his employment. Appellant does not contend otherwise. For obvious reasons, appellant could not, and did not, deny the publication. It relied solely upon the protection of qualified privilege.

[HN2] In libel per se, damage to reputation is presumed, *General Motors Corp. v. Piskor*, 27 Md. App. 95, 117, 340 A. 2d 767 (1975). In awarding compensatory damages, however, a jury should look to evidence of actual injury.

The Supreme Court, in *Gertz v. Robert Welch, Inc.*, supra, noted, at 349:

"The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under [**136] the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred."

[***18] [*180] To reconcile state law with the command of the First Amendment, the Court held, at 349-50:

"It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

There was evidence at the trial below from which the jury could find that Mayo suffered actual injury, at least to the extent of personal humiliation, embarrassment, and mental anguish and suffering.

The trial judge did not err in refusing to instruct the jury that there was no evidence of compensable damage.

Punitive Damages

Appellant next argues that the jury's award of damages of \$1.00 was nominal, not compensatory, and precluded a verdict for punitive damages.

It is not clear how the point is preserved[***19] for appeal, unless it arises from the objection to the court's failure to instruct that there was no evidence of any damage. In any event, the contention is not a valid one. In *Shell Oil Co. v. Parker*, 265 Md. 631, 291 A. 2d 64 (1972), the Court of Appeals said, at 644:

[HN3] "To allow punitive damages where only a technical invasion of the plaintiff's rights existed would permit recovery of damages when, in fact, no compensable injury was proved. We therefore hold that to support an award of punitive damages in [*181] Maryland there must first be an award of at least nominal compensatory damages."

The necessity of a compensatory damage base for punitive damages, in a tort involving malice, is unrelated to the distinction between common law malice, for most intentional torts, and the constitutional malice required in defamation cases by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), and *Gertz*, supra. For an illustration of the constitutional malice distinction, see *General Motors Corp. v. Piskor*, 277 Md. 165, 352 A. 2d 810 (1976), at 174-75.

Prejudicial Instruction

35 Md. App. 169, *, 370 A.2d 130, **;
1977 Md. App. LEXIS 465, ***; 94 L.R.R.M. 3126

In his instructions to the jury the judge referred[***20] to a contention in the case. He said:

"I believe that if you look thru the exhibits which were entered into evidence, the first complaint or written complaint in the step it was the Union's position that violation of Rule 11, and this is advisory only, you read it and see what it says, that violation of Rule 11 has been known to lead to firing of various employees and they felt that, so as to speak, of what was sauce for the goose, was sauce for the gander, and they felt that alteration or falsification of a record of this nature should also, I believe it was their theory, but you interpret it your own way, should lead to possible discharge of Mr. Mayo. And it's all there and you'll take these things back to the jury room for your deliberations and don't rely on my recollection, you see what it actually says itself, * * *."

An objection was made that the court's "implication" went well beyond any of the [**137] testimony, and could be inflammatory or prejudicial.

In addition to the general statement early in the instructions that

[*182] " * * matters of fact are for your determination and should I mention the facts in discussing the case with you, and[***21] you disagree with my recollection of the facts, then please, use your own recollection and not mine because you are the ultimate deciders of the facts in this case.",

the court's subsequent reference to specific evidence was accompanied by further cautioning of the jury not to rely on the court's recollection.

There was no error.

Judgment affirmed.

Appellant to pay costs.

JACKSON v. METROPOLITAN EDISON CO.
No. 73-5845

SUPREME COURT OF THE UNITED STATES

419 U.S. 345; 95 S. Ct. 449; 42 L. Ed. 2d 477; 1974 U.S.LEXIS 50; 8 P.U.R.4th 1

October 15, 1974, Argued
December 23, 1974, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DISPOSITION: 483 F.2d 754, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner consumer sought review by certiorari of a decision of the United States Court of Appeals for the Third Circuit affirming the dismissal of her 42 U.S.C.S. § 1983 action against respondent utility company. Petitioner argued the court erred in finding that the termination of her electric service did not constitute state action and hence was not subject to judicial scrutiny under the Fourteenth Amendment.

OVERVIEW: After respondent utility company terminated her electricity for non-payment, petitioner consumer filed suit under 42 U.S.C.S. § 1983, seeking damages for the termination and an injunction requiring the utility company to continue providing service until she was afforded notice, a hearing, and an opportunity to pay any amounts found due. Petitioner urged that the termination of her service, allowed by a provision of the utility company's general tariff filed with the state public utility commission, constituted "state action" depriving her of property in violation of the Fourteenth Amendment's guarantee of due process of law. The district court found that the termination did not constitute state action and was not subject to judicial scrutiny under the Fourteenth Amendment, and the appeals court affirmed. The Court held that the state was not sufficiently connected with the utility company's action in terminating petitioner's service to make its conduct in so doing attributable to the state for purposes of the Fourteenth Amendment. The Court lacked jurisdiction to decide whether petitioner's claim to continued service was "property" for purposes of that Amendment.

OUTCOME: The Court affirmed the decision affirming the dismissal of petitioner's civil rights action against respondent utility company because the termination of her electric service did not constitute state action. The Court ruled that the state's approval of the utility company's business practices did not transmute the termination into state action.

CORE TERMS: monopoly, state action, termination, tariff, regulation, Fourteenth Amendment, involvement, public interest, state-action, regulated, state law, electric, entity, customer, entitlement, nonpayment, public utility, certificate, notice, reasonable notice, public convenience, regulatory scheme, privately owned, public function, process of law, continuous, discontinue, racial discrimination, state regulation, public service

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Procedural Due Process: Scope of Protection
[HN1] See U.S. Const. amend. XIV.

419 U.S. 345, *; 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

Constitutional Law: Procedural Due Process: Scope of Protection

[HN2] The Due Process Clause of the Fourteenth Amendment provides that nor shall any state deprive any person of life, liberty, or property, without due process of law. The essential dichotomy set forth in that Amendment differentiates between deprivation by the state, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Procedural Due Process: Scope of Protection

[HN3] The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. The true nature of the state's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN4] State action may be present in the exercise by a private entity of powers traditionally exclusively reserved to the state.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN5] The Pennsylvania courts reject the contention that the furnishing of utility services is either a state function or a municipal duty.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN6] There is no closed class or category of businesses affected with a public interest. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. Thus, the expressions "affected with a public interest" and "clothed with a public use" are not susceptible of definition and form an unsatisfactory test.

SUMMARY: An action for damages and injunctive relief was instituted against a privately owned Pennsylvania utility company in the United States District Court for the Middle District of Pennsylvania, based on the company's termination of electric service to the plaintiff's home for nonpayment of bills. Originally, the company had terminated an account in the plaintiff's name for delinquency in payments, but service was resumed in the name of a third person, another occupant of the residence. Subsequently, service under such latter account was terminated for nonpayment, and the plaintiff contended that the company's termination of service constituted "state action," depriving her of property in violation of the due process clause of the Fourteenth Amendment, since she had not been given notice, a hearing, and an opportunity to pay any amounts found due. The District Court dismissed the complaint (348 F Supp 954), and the United States Court of Appeals for the Third Circuit affirmed (483 F2d 754).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, J., expressing the view of six members of the court, it was held that the utility company's termination of service to the household did not constitute "state action" subject to Fourteenth Amendment due process requirements, since even though the company was engaged in a business affected with a public interest, was subject to extensive state regulation in many particulars, and enjoyed at least a partial monopoly within its service territory, (1) there was no such relationship between the company's action and its monopoly status as would establish "state action," (2) the company was not performing a "public function," state law imposing no obligation on the state to furnish utility services, (3) the state utility commission's approval of the company's general tariff, without express consideration of the provisions therein as to the company's procedure for termination of services for nonpayment, merely constituted a finding that state law permitted the company to employ such procedure, without placing the state's imprimatur on the procedure so as to establish "state action," and (4) the state was not a joint participant in the company's enterprise.

Douglas, J., dissented on the ground that when properly considered in the aggregate, rather than individually, the relevant factors in the case--the utility company's monopoly status, the public interest involved in its services, and the

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

extensive state supervision and control--established that the utility company's termination of services was "state action," subject to procedural due process requirements.

Brennan, J., dissenting, expressed the view that the question whether termination of service constituted state action should not have been considered, since the third person, rather than the plaintiff, was the defendant's "customer" when service was terminated, there thus being no controversy between the plaintiff and the defendant.

Marshall, J., dissenting, stated that the writ of certiorari should have been dismissed as improvidently granted, since it was unclear whether the plaintiff had a property right under state law to the service she had received from the defendant, but in any event, state action should have been found, since the defendant, a monopoly, provided an essential public service, subject to regulation by the state, which approved the defendant's termination procedures--due process requiring, at a minimum, advance notice of a proposed termination with a clear indication that a responsible company official could readily be contacted to consider any claim of error.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

due process -- "state action" -- electric company's termination of service --

Headnote:

The action of a privately owned and operated utility company, having a state certificate of public convenience, in terminating electric service to a household for nonpayment of bills, without notice to the householder, a hearing, and an opportunity to pay any amounts found due, does not constitute "state action" subject to Fourteenth Amendment due process requirements where even though the company was engaged in a business affected with a public interest, was subject to extensive state regulation in many particulars, and enjoyed at least a partial monopoly within its service territory, (1) there was no such relationship between the company's action and its monopoly status as would establish "state action," (2) the company was not performing a "public function," since state law imposed no obligation on the state to furnish utility services, (3) the state utility commission's approval, as required by state law, of the company's general tariff, without express consideration of the provisions therein as to the company's procedure for termination of services for nonpayment, merely constituted a finding by the commission that state law permitted the company to employ such procedure if it so desired, without placing the state's imprimatur on the procedure so as to establish "state action," and (4) the state was not a joint participant in the company's enterprise.

[***HN2]

due process clause -- state action -- private conduct --

Headnote:

The due process clause of the Fourteenth Amendment, which prohibits "any State" from depriving any person of life, liberty, or property without due process of law, presents an essential dichotomy between deprivation by the state, subject to scrutiny under its provisions, and private conduct, however discriminatory and wrongful, against which the Fourteenth Amendment offers no shield.

[***HN3]

due process -- state action -- business regulated by state --

Headnote:

The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the due process clause of the Fourteenth Amendment; nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so; although acts of a heavily regulated utility with at least something of a governmentally protected monopoly may more readily be found to be "state" acts than will be acts of an entity lacking such characteristics, nevertheless the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

[***HN4]

due process -- electric company's termination of services -- "state action" --

Headnote:

The fact that a privately owned electric utility company has a monopoly under state law is not determinative in considering whether its termination of service to a household is "state action" for purposes of the due process clause of the Fourteenth Amendment.

[***HN5]

due process -- state action -- acts of regulated businesses --

Headnote:

All state regulated businesses affected with a public interest are not "state actors" in all their actions for purposes of the due process clause of the Fourteenth Amendment.

[***HN6]

due process -- state action -- acts of regulated businesses --

Headnote:

While doctors, optometrists, lawyers, electric utility companies, and grocers are all in state regulated businesses, providing arguably essential goods and services affected with a public interest, nevertheless such a status, absent more, does not convert their every action into that of the state for purposes of the due process clause of the Fourteenth Amendment.

[***HN7]

due process -- state action -- acts of private utility --

Headnote:

A state utility commission's approval of a private utility's proposed business practice, as required by state law, does not transmute the utility's business practice into "state action" for purposes of the due process clause of the Fourteenth Amendment, where the commission has not put its own weight on the side of the proposed practice by ordering it, the initiative for the proposed practice coming from the utility rather than the state; at most, the commission's failure to overturn the practice amounts to no more than a determination that the utility is authorized to employ such practice if it so desires.

SYLLABUS: Petitioner brought suit against respondent, a privately owned and operated utility corporation which holds a certificate of public convenience issued by the Pennsylvania Utility Commission, seeking damages and injunctive relief under 42 U. S. C. § 1983 for termination of her electric service allegedly before she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. Petitioner claimed that under state law she was entitled to reasonably continuous electric service and that respondent's termination for alleged nonpayment, permitted by a provision of its general tariff filed with the Commission, was state action depriving petitioner of her property without due process of law and giving rise to a cause of action under § 1983. The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint. Held: Pennsylvania is not sufficiently connected with the challenged termination to make respondent's conduct attributable to the State for purposes of the Fourteenth Amendment, petitioner having shown no more than that respondent was a heavily regulated private utility with a partial monopoly and that it elected to terminate service in a manner that the Commission found permissible under state law. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, distinguished. Pp. 349-359.

COUNSEL: Jack Greenberg argued the cause for petitioner. On the briefs were Alan Linder and Jonathan M. Stein.

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

Thomas M. Debevoise argued the cause and filed a brief for respondent. *

* Briefs of amici curiae urging reversal were filed by Franklin A. Martens for the National Consumer Law Center, Inc., et al., and by Richard A. Weisz, Stefan M. Rosenzweig, Michael B. Weisz, and Anthony G. Amsterdam for the Legal Aid Foundation of Long Beach et al.

Gilbert Stein filed a brief for the city of Philadelphia as amicus curiae urging affirmance.

Peter H. Schiff and Richard A. Solomon filed a brief for the Public Service Commission of New York as amicus curiae.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., post, p. 359, BRENNAN, J., post, p. 364, and MARSHALL, J., post, p. 365, filed dissenting opinions.

OPINIONBY: REHNQUIST

OPINION: [*346] [***481] [**451] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Metropolitan Edison Co. is a privately owned and operated Pennsylvania corporation which holds a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area which includes the city of York, Pa. As a condition of holding its certificate, it is subject to extensive regulation by the Commission. Under a provision of its general tariff filed with the Commission, it has the right to discontinue service to any customer on reasonable notice of nonpayment of bills. n1

-----Footnotes-----

n1 Metropolitan Edison Company Electrical Tariff, Electric Pa. P. U. C. No. 41, Rule 15. This portion of Metropolitan's general tariff, filed with the Utility Commission under the notice-filing requirement of Pa. Stat. Ann., Tit. 66, § 1142 (1959) (since the general tariff involved a rate increase), provides in pertinent part:

"(15) -- Cause for discontinuance of service.

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill"

Its filed tariff also gives it the right to terminate service for fraud or for tampering with a meter but Metropolitan did not seek to assert these grounds below.

-----End Footnotes-----

[*347] Petitioner Catherine Jackson is a resident of York, who has received electricity in the past from respondent. Until September 1970, petitioner received electric service to her home in York under an account with respondent in her own name. When her account was terminated because of asserted delinquency in payments due for service, a new account with respondent was opened in the name of one James Dodson, another occupant of the residence, and service to the residence was resumed. There is a dispute as to whether payments due under the Dodson account for services provided during this period were ever made. In August 1971, Dodson left the residence. Service continued thereafter [***482] but concededly no payments were made. Petitioner [**452] states that no bills were received during this period.

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

On October 6, 1971, employees of Metropolitan came to the residence and inquired as to Dodson's present address. Petitioner stated that it was unknown to her. On the following day, another employee visited the residence and informed petitioner that the meter had been tampered with so as not to register amounts used. She disclaimed knowledge of this and requested that the service account for her home be shifted from Dodson's name to that of one Robert Jackson, later identified as her 12-year-old son. Four days later on October 11, 1971, without further notice to petitioner, Metropolitan employees disconnected her service.

Petitioner then filed suit against Metropolitan in the United States District Court for the Middle District of Pennsylvania under the Civil Rights Act of 1871, 42 U. S. C. § 1983, seeking damages for the termination and an injunction requiring Metropolitan to continue providing power to her residence until she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. She urged that under state law she had an [*348] entitlement to reasonably continuous electrical service to her home n2 and that Metropolitan's termination of her service for alleged nonpayment, action allowed by a provision of its general tariff filed with the Commission, constituted "state action" depriving her of property in violation of the Fourteenth Amendment's guarantee of due process of law. n3

-----Footnotes-----

n2 The basis for this claimed entitlement is Pa. Stat. Ann., Tit. 66, § 1171 (1959), providing in part:

"Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities Such service also shall be reasonably continuous and without unreasonable interruptions or delay. . . ."

Mrs. Jackson finds in this provision a state-law entitlement to continuing utility service to her residence. She reasons that under the Due Process Clause of the Fourteenth Amendment she cannot be deprived of this entitlement to utility service without adequate notice and a hearing before an impartial body: until these are completed, her service must continue. Because of our conclusion on the threshold question of state action, we do not reach questions relating to the existence of a property interest or of what procedural guarantees the Fourteenth Amendment would require if a property interest were found to exist.

MR. JUSTICE BRENNAN, dissenting, post, at 364, concludes that there is no justiciable controversy between petitioner and respondent because whatever entitlement to service petitioner had was previously terminated by respondent in accordance with its tariff. We do not believe this to be any less a determination of the merits of the action than is our conclusion that whatever deprivation she may have suffered was not caused by the State. Issues of whether a claimed entitlement is "property" within the meaning of the Due Process Clause, Board of Regents v. Roth, 408 U.S. 564 (1972), and whether if so its deprivation was consistent with due process, see Arnett v. Kennedy, 416 U.S. 134 (1974), are themselves constitutional questions which we find no occasion to reach in this case.

n3 Section 1 of the Fourteenth Amendment provides in part:

[HN1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

-----End Footnotes-----

[*349]

***HR1A] The District Court granted Metropolitan's motion to dismiss petitioner's complaint on the ground that the termination did not constitute state action and hence was not subject to judicial scrutiny under the ***483] Fourteenth Amendment. n4 On appeal, the United States Court of Appeals for the Third Circuit affirmed, also finding an absence of state action. n5 We granted certiorari to review this judgment. n6

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

-----Footnotes-----

n4 The decision is reported at 348 F.Supp. 954 (1972).

n5 The decision is reported at 483 F.2d 754 (1973).

n6 415 U.S. 912 (1974). Compare *Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624 (CA7), cert. denied, 396 U.S. 846 (1969); *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (CA7 1972), cert. denied, 409 U.S. 1114 (1973), with *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (CA6 1973), modified in *Turner v. Impala Motors*, 503 F.2d 607 (CA6 1974). Cf. *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (CA8), vacated as moot, 409 U.S. 815 (1972).

-----End Footnotes-----

[**453]

[***HR2] [HN2] The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the Civil Rights Cases, 109 U.S. 3, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

We have reiterated that distinction on more than one occasion since then. See, e. g., *Evans v. Abney*, 396 U.S. 435, 445 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-179 (1972). While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is "private," on [*350]the one hand, or "state action," on the other, frequently admits of no easy answer. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723 (1961); *Moose Lodge No. 107 v. Irvis*, supra, at 172.

[***HR3] Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. [HN3] The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. n7 407 U.S., at 176-177. [***484] Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952). It may well be that [*351] acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107*, supra, at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether [**454] the test is met. *Burton v. Wilmington Parking Authority*, supra.

-----Footnotes-----

n7 Enterprises subject to the same regulatory system as Metropolitan are enumerated in the definition of "public utility" contained in Pa. Stat. Ann., Tit. 66, § 1102 (17) (1959 and Supp. 1974-1975). Included in this definition are all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies; and corporations affiliated with any company engaging in such activities. Among some of the enterprises held subject to this regulatory scheme are freight forwarding and storage

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

companies (Highway Freight Co. v. Public Service Comm'n, 108 Pa. Super. 178, 164 A. 835 (1933)), real estate developers who, incident to their business, provide water services (Sayre Land Co. v. Pennsylvania Public Utility Comm'n, 21 D. & C. 2d 469 (1959)), and individually owned taxicabs. Pennsylvania Public Utility Comm'n v. Israel, 356 Pa. 400, 52 A. 2d 317 (1947). In Philadelphia Rural Transit Co. v. Philadelphia, 309 Pa. 84, 93, 159 A. 861, 864 (1932), the court estimated that there were 26 distinct types of enterprises subject to this regulatory system, and a fair reading of Pennsylvania law indicates a substantial expansion of included enterprises since that case. The incidents of regulation do not appear materially different between enterprises. If the mere existence of this regulatory scheme made Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania.

-----End Footnotes-----

[***HR1B] Petitioner advances a series of contentions which, in her view, lead to the conclusion that this case should fall on the Burton side of the line drawn in the Civil Rights Cases, supra, rather than on the Moose Lodge side of that line. We find none of them persuasive.

[***HR4] Petitioner first argues that "state action" is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. n8 But assuming that it had, this fact is not determinative in considering [*352] whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment. In Pollak, supra, where the Court dealt with the activities of the District of Columbia Transit Co., a congressionally established monopoly, we expressly disclaimed reliance on the monopoly status of the transit authority. 343 U.S., at 462. Similarly, although certain monopoly aspects were presented in Moose Lodge No. 107, supra, we found that the [***485]Lodge's action was not subject to the provisions of the Fourteenth Amendment. In each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here.

-----Footnotes-----

n8 It is provided in Pa. Stat. Ann., Tit. 66, § 1121 (Supp. 1974-1975), that issuance of a certificate of public convenience is a prerequisite for engaging in the utility business in Pennsylvania. The requirements for obtaining such a certificate are described in Pa. Stat. Ann., Tit. 66, §§ 1122, 1123 (1959 and Supp. 1974-1975). There is nothing in either Metropolitan's certificate or in the statutes under which it was issued indicating that the State has granted or guaranteed to Metropolitan monopoly status. In fact Metropolitan does face competition within portions of its service area from another private utility company and from municipal utility companies. Metropolitan was organized in 1874, 39 years before Pennsylvania's adoption of its first utility regulatory scheme in 1913. There is no indication that it faced any greater competition in 1912 than today. As petitioner admits, such public utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Col. L. Rev. 514 (1911); H. Trachsel, Public Utility Regulation 7-8, 52 (1947). Regulation was superimposed on such natural monopolies as a substitute for competition and not to eliminate it:

"The primary object of the Public Utility Law is not to establish monopolies or to guarantee the security of investments in public service corporations, but to serve the interests of the public." Highway Express Lines, Inc. v. Pennsylvania Public Utility Comm'n, 195 Pa. Super. 92, 100, 169 A. 2d 798, 802 (1961); cf. Pottsville Union Traction Co. v. Public Service Comm'n, 67 Pa. Super. 301, 304 (1917).

-----End Footnotes-----

Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, § 1171 (1959), and hence performs a "public function." We have, of course, found [HN4] state action present in the exercise by a private entity of powers

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

traditionally exclusively reserved to the State. See, e. g., *Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Terry v. Adams*, 345 U.S. 461 (1953) (election); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park). If [*353] we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. [HN5] The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. *Girard Life Insurance Co. v. City of Philadelphia*, 88 Pa. 393 (1879); *Baily v. Philadelphia*, 184 Pa. 594, 39 A. 494 (1898).

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.

[***HR5] We decline the invitation for reasons stated long ago in *Nebbia v. New York*, 291 U.S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation:

"It is clear that [HN6] there is no closed class or category of businesses affected with a public interest The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test" *Id.*, at 536.

See, e. g., *Tyson & Brother v. Banton*, 273 U.S. 418, 451 (1927) (Stone, J., dissenting).

[*354]

[***HR6] Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every [***486] action, absent more, into that of the State. n9

-----Footnotes-----

n9 The argument has been impliedly rejected by this Court on a number of occasions. See, e. g., *Civil Rights Cases*, 109 U.S. 3, 8 (1883). It is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools, yet we stated in *Evans v. Newton*, 382 U.S. 296, 300 (1966):

"The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems."

-----End Footnotes-----

We also reject the notion that Metropolitan's termination is state action because the State "has specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff -- a provision of which states Metropolitan's right to terminate service for nonpayment. n10 This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission. n11 Although the Commission did hold [*355] hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff. n12 The provision became effective 60 days after filing when not disapproved by the Commission. n13

419 U.S. 345, *; 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

-----Footnotes-----

n10 See n. 1, supra. The same provision appeared in all of Metropolitan's prior general tariffs. The sole reason for substituting the new general tariff, which contains all the terms and conditions of Metropolitan's service, was to procure a rate increase. This was the sole change between Metropolitan's Electrical Tariff No. 41 and its predecessor.

n11 Petitioner does not contest the fact that Metropolitan had this right at common law before the advent of regulation. Brief for Petitioner 31.

n12 Petitioner concedes that the hearing was solely devoted to the question of the proposed rate increase. Id., at 30.

n13 See Pa. Stat. Ann., Tit. 66, § 1148 (1959); Pa. P. U. C. Tariff Regulations, § II, "Public Notice of Tariff Changes." These provisions specify that utility companies must give 60 days' notice to the public before changing their rules filed in their general tariff. Since Pa. Stat. Ann., Tit. 66, § 1171 (1959), provides that "[subject] to . . . the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service," the Commission arguably had the power to disapprove utility rules. There is no evidence that it has ever even considered the provision in question. When the 60-day notice period passed, the provisions became effective.

-----End Footnotes-----

As [**456] a threshold matter, it is less than clear under state law that Metropolitan was even required to file this provision as part of its tariff or that the Commission would have had the power to disapprove it. n14 The District Court observed that the sole connection of the Commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it. n15

-----Footnotes-----

n14 Pennsylvania P. U. C. Tariff Regulations, § VIII, "Discount for Prompt Payment and Penalties for Delayed Payment of Bills," is the only authority cited for a state-imposed requirement that Metropolitan file its termination provision as part of its general tariff. This section requires the filing of "penalties" imposed upon customers for failures to pay bills promptly. Respondent argues that this applies only to monetary penalties. There is no Pennsylvania case law on the question.

n15 "The only apparent state involvement with the activity complained of here is in Tariff Reg. VIII of the Pennsylvania P. U. C. . . . [The] purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. As in Kadlec, defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or cooperated in the suspension of service." 348 F.Supp., at 958.

-----End Footnotes-----

419 U.S. 345, *; 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

[*356] [***487]

[***HR7] The case most heavily relied on by petitioner is *Public Utilities Comm'n v. Pollak*, supra. There the Court dealt with the contention that Capital Transit's installation of a piped music system on its buses violated the First Amendment rights of the bus riders. It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the "State" for First Amendment purposes, or whether it merely assumed, arguendo, that it was and went on to resolve the First Amendment question adversely to the bus riders. n16 In either event, the nature of the state involvement there was quite different than it is here. The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit's practices were "not inconsistent with public convenience, comfort, and safety," 81 P. U. R. (N. S.) 122, 126 (1950), but also that the [*357] practice "in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride." Ibid. Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains. The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering [**457] it, does not transmute a practice initiated by the utility and approved by the commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, n17 does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

-----Footnotes-----

n16 See 343 U.S., at 462. At one point the Court states:

"We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments." Ibid.

Later, the opinion states:

"We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government . . . assuming that the action of Capital Transit . . . amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." Id., at 462-463. (Emphasis added.)

The Court then went on to find no constitutional violation in the challenged action.

n17 As in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972), there is no suggestion in this record that the Pennsylvania Public Utility Commission intended either overtly or covertly to encourage the practice. See n. 15, supra .

-----End Footnotes-----

We [***488] also find absent in the instant case the symbiotic relationship presented in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). There where a private lessee, who practiced racial discrimination, leased space for a restaurant from a state parking authority in a publicly owned building, the Court held that the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in [*358] the enterprise. Id., at 725. We cautioned, however, that while "a multitude of relationships might appear to some to fall within the Amendment's embrace," differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. Id., at 726.

419 U.S. 345, *; 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

Metropolitan is a privately owned corporation, and it does not lease its facilities from the State of Pennsylvania. It alone is responsible for the provision of power to its customers. In common with all corporations of the State it pays taxes to the State, and it is subject to a form of extensive regulation by the State in a way that most other business enterprises are not. But this was likewise true of the appellant club in *Moose Lodge No. 107 v. Irvis*, supra, where we said:

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S., at 176-177.

[***HR1C] All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's [*359] conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. We therefore have no occasion to decide whether petitioner's claim to continued service was "property" for purposes of that Amendment, or whether "due process of law" would require a State taking similar action to accord petitioner the procedural rights for which she contends. The judgment of the Court of Appeals for the Third Circuit is therefore

Affirmed.

DISSENTBY: DOUGLAS; BRENNAN; MARSHALL

DISSENT: MR. JUSTICE DOUGLAS, dissenting.

I reach the opposite conclusion from that reached by the majority on the state-action issue.

The injury alleged took place when respondent discontinued its [***489] service to this householder without notice or opportunity to remedy or contest her alleged default, [**458] even though its tariff provided that respondent might "discontinue its service on reasonable notice." n1 May a State allow a utility -- which in this case has no competitor -- to exploit its monopoly in violation of its own tariff? May a utility have complete immunity under federal law when the State allows its regulatory agency to become the prisoner of the utility or, by a listless attitude of no concern, to permit the utility to use its monopoly power in a lawless way?

-----Footnotes-----

n1 Rule 15 of the tariff provides in part:

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof."

-----End Footnotes-----

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), we said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [*360] State in private conduct be attributed its true significance." *Id.*, at 722. A particularized inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within "the variety of individual-state relationships which the [Fourteenth] Amendment was designed to embrace." *Ibid.* As our subsequent discussion in *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. *n2 Id.*, at 722-726. See generally *Moose Lodge No. 107 v. Irisv*, 407 U.S. 163 (1972).

-----Footnotes-----

n2 The court below in *Burton* had relied heavily on a number of facts indicating minimal state involvement, but we regarded that court's analysis as unduly restricted in its scope: "While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged." 365 U.S., at 723.

After discussing those additional factors in greater detail, we concluded: "Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.*, at 724.

-----End Footnotes-----

It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

It is said that the mere fact of respondent's monopoly status, assuming arguendo that that status is state conferred or state protected, *n3* [***490] "is not determinative in considering [*361] whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment." *Ante*, at 351-352. Even so, a state-protected monopoly status is highly relevant in assessing the aggregate weight of a private entity's ties to the State. *n4*

-----Footnotes-----

n3 It seems irrelevant that Metropolitan was organized prior to the inauguration of utility regulation in Pennsylvania, and that a utility of this sort is, for all practical purposes, a natural monopoly. Whatever its origins, the existing situation presents a monopoly enterprise subject to detailed state regulation; the nature and extent of that regulation take on particular significance in light of the lack of any alternative source of service available to Metropolitan's customers.

n4 Our disclaimer of reliance upon this factor in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952), should not be read as holding that monopoly status is wholly irrelevant; the "disclaimer" on its face simply states that monopoly status was not used as an ingredient of the finding of federal governmental involvement in that case.

-----End Footnotes-----

It [***459] is said that the fact that respondent's services are "affected with a public interest" is not determinative. I agree that doctors, lawyers, and grocers are not transformed into state actors simply because they provide arguably essential goods and services and are regulated by the State. In the present case, however, respondent is not just one

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

person among many; it is the only public utility furnishing electric power to the city. When power is denied a householder, the home, under modern conditions, is likely to become unlivable.

Respondent's procedures for termination of service may never have been subjected to the same degree of state scrutiny and approval, whether explicit or implicit, that was present in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). Yet in the present case the State is heavily involved in respondent's termination procedures, getting into the approved tariff a requirement of "reasonable notice." Pennsylvania has undertaken to regulate numerous aspects of respondent's operations in some detail, n5 [*362] and a "hands-off" attitude of permissiveness or neutrality toward the operations in this case is at war with the state agency's functions of supervision over respondent's conduct in the area of servicing householders, particularly where (as here) the State would presumably lend its weight and authority to facilitate the enforcement of respondent's published procedures. Cf. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

-----Footnotes-----

n5 The Public Utility Commission is given extensive control over utility rates, Pa. Stat. Ann., Tit. 66, § 1141 et seq. (1959 and Supp. 1974-1975), and over the character and quality of utility services and facilities, §§ 1171, 1182-1183; it is given broad power to receive and investigate complaints, §§ 1391, 1398, and to regulate and supervise the activities, rules, and contractual undertakings of utilities, §§ 1171, 1341-1343, 1360.

-----End Footnotes-----

In the aggregate, these factors depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control. The particular regulations at issue, promulgated by the monopolist, were authorized by state law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions [***491] are sufficiently intertwined with those of the State, and its termination-of-service provisions are sufficiently buttressed by state law to warrant a holding that respondent's actions in terminating this householder's service were "state action" for the purpose of giving federal jurisdiction over respondent under 42 U. S. C. § 1983. Though the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise, ante, at 358, its underlying analysis is [*363]fundamentally sequential rather than cumulative. In that perspective, what the Court does today is to make a significant departure from our previous treatment of state-action issues.

Mr. Justice Brandeis in *Liggett Co. v. Lee*, 288 U.S. 517 (1933), in speaking of the competition among the States to ease the opportunities and methods of incorporation, said: "The race was one not of diligence but of laxity." *Id.*, at 559 (dissenting opinion). One has only to peruse the 84-part Utility Corporations Report by the Federal Trade Commission (under the direction of its able counsel the late Robert E. Healy) to realize that state regulation of utilities has largely made state commissions prisoners of the utilities. See especially S. Doc. No. 92, 70th Cong., 1st Sess., pt. [**460] 73-A (1936); and see *id.*, pt. 72-A, p. 880. In this connection it should be noted that successful attempts by public utilities to exclude themselves from the antitrust laws have been based on the assertion that their monopoly activity constitutes "state action." See *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 250-252 (CA4 1971); *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1138-1140 (CA5 1971).

By like token the tariff prescribing termination-of-service procedures was possible only because of "state action." And it would be compatible only with administrative abdication of authority to equate "administrative silence with abandonment of administrative duty." *Washington Gas Light Co. v. Virginia Electric & Power Co.*, *supra*, at 252.

Section 1983 was designed to give citizens a federal forum n6 for civil rights complaints wherever, by direct or [*364] indirect actions, a State, acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely. I realize we are in an area where we

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

witness a great retreat from the exercise of federal jurisdiction which the Congress has conferred on federal courts. The sentiment here is that state courts are as hospitable as federal courts to federal claims. That may well be true, in some instances. But it is for the Senate and the House to make that decision. We should not tolerate an erosion of the policy Congress expressed in drafting § 1983.

-----Footnotes-----

n6 There is no requirement for an exhaustion of state remedies before suing under § 1983 (see *Wilwording v. Swenson*, 404 U.S. 249 (1971)), though suggestions for statutory changes in that regard have been made. *Judd*, *The Expanding Jurisdiction of the Federal Courts*, 60 A. B. A. J. 938, 941 (1974).

-----End Footnotes-----

Section [***492] 1983 addresses itself to grievances inflicted "under color of any statute, ordinance, [or] regulation . . . of any State" The regulatory regime imposed by Pennsylvania on respondent utility seems to fit this statute like a glove. Electrical service, being a necessity of life under the circumstances of this case, is an entitlement which under our decisions may not be taken without the requirements of procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (CA6 1973).

MR. JUSTICE BRENNAN, dissenting.

I do not think that a controversy existed between petitioner and respondent entitling petitioner to be heard in this action. Under Pennsylvania law respondent's duty under Pa. Stat. Ann., Tit. 66, § 1171 (1959), to provide service was limited by § 25 of the General Rules and Regulations, the Electric Service Tariff, on file with the [*365] Pennsylvania Public Utility Commission, to provision of such service only to "customers," defined as "[any] [persons] . . . lawfully receiving service from [the] Company." Petitioner, as the Court notes, ceased being a "customer" in September 1970 when her account was terminated for nonpayment of bills. That termination was pursuant to Rule 15 of the tariff quoted by the Court in n. 1. From September 1970 to September 1971, respondent's "customer" was James Dodson; and his delinquency in payment for service during that period, not petitioner's delinquency before September 1970, was the occasion for the termination of service on October 11, 1971. An effort by petitioner at that time to have service continued if she paid \$30 on account on her delinquent 1970 bill failed when respondent rejected the offer and shut off the service. In these circumstances petitioner had no basis in my view for the [*461] claimed entitlement under § 1171 quoted by the Court in n. 2, and therefore no controversy existed between petitioner and respondent which could be the subject of her action. I would therefore intimate no view upon the correctness of the holdings below whether the termination of service on October 11, 1971, constituted state action but would vacate the judgment of the Court of Appeals with direction that the case be remanded to the District Court with instruction to enter a new judgment dismissing the complaint. See *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969).

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother BRENNAN that this case is a very poor vehicle for resolving the difficult and important questions presented today. The confusing sequence of events leading to the challenged termination makes it unclear whether petitioner has a property right under state law to the service she was receiving from the [*366] respondent company. Because these complexities would seriously hamper resolution of the merits of the case, I would dismiss the writ as improvidently granted. Since the Court has disposed of the case by finding no state action, however, I think it appropriate to register my dissent on that point.

I

The Metropolitan Edison Co. [***493] provides an essential public service to the people of York, Pa. It is the only entity, public or private, that is authorized to supply electric service to most of the community. As a part of its charter to the company, the State imposes extensive regulations, and it cooperates with the company in myriad ways. Additionally, the State has granted its approval to the company's mode of service termination -- the very conduct that is challenged

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

here. Taking these factors together, I have no difficulty finding state action in this case. As the Court concluded in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the State has sufficiently "insinuated itself into a position of interdependence with [the company] that it must be recognized as a joint participant in the challenged activity."

Our state-action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the "private" entity and the State; and a service uniquely public in nature. Today the Court takes a major step in repudiating this line of authority and adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations.

A

When the State confers a monopoly on a group or organization, this Court has held that the organization assumes many of the obligations of the State. *Railway [**367] Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). Even when the Court has not found state action based solely on the State's conferral of a monopoly, it has suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). Indeed, in *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 177 (1972), the Court was careful to point out that the Pennsylvania liquor-licensing scheme "falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole."

The majority distinguishes this line of cases with a cryptic assertion that public utility companies are "natural monopolies." Ante, at 351-352, n. 8. The theory behind the distinction appears to be that since the State's purpose in regulating [**462] a natural monopoly is not to aid the company but to prevent its charging monopoly prices, the State's involvement is somehow less significant for state-action purposes. I cannot agree that so much should turn on so narrow a distinction. Initially, it is far from obvious that an electric company would not be subject to competition if the market were unimpeded by governmental restrictions. Certainly the "start-up" costs of initiating electric service are substantial, but the rewards available in a relatively inelastic market might well be sufficient under the right circumstances to attract competitive investment. Instead, the State has chosen to forbid the high profit margins that might invite private competition or increase pressure [***494] for state ownership and operation of electric power facilities.

The difficulty inherent in this kind of economic analysis counsels against excusing natural monopolies from the reach of state-action principles. To invite inquiry into whether a particular state-sanctioned monopoly might have survived without the State's express approval [*368] grounds the analysis in hopeless speculation. Worse, this approach ignores important implications of the State's policy of utilizing private monopolies to provide electric service. Encompassed within this policy is the State's determination not to permit governmental competition with the selected private company, but to cooperate with and regulate the company in a multitude of ways to ensure that the company's service will be the functional equivalent of service provided by the State. n1

-----Footnotes-----

n1 The State's regulatory pattern makes it amply clear that it expects utility companies to behave more like governmental entities than private corporations. The rates are fixed by the Public Utility Commission, as are the standards of service and the company's system of accounting. Pa. Stat. Ann., Tit. 66, §§ 1141, 1149, 1171, 1182, 1183, 1211 (1959). The character of the facilities is subject to state approval and continuing supervision, and the State also requires that the service "shall be reasonably continuous and without unreasonable interruptions or delay." § 1171. The certificate of public convenience confers certain eminent domain rights upon the company, § 1124 (Supp. 1974-1975), as well as the right of entry onto a customer's property to maintain and inspect its equipment. Pa. P. U. C. Electric Regulations, Rule 14D.

-----End Footnotes-----

B

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

The pattern of cooperation between Metropolitan Edison and the State has led to significant state involvement in virtually every phase of the company's business. The majority, however, accepts the relevance of the State's regulatory scheme only to the extent that it demonstrates state support for the challenged termination procedure. Moreover, after concluding that the State in this case had not approved the company's termination procedures, the majority suggests that even state authorization and approval would not be sufficient: the State would apparently have to order the termination practice in question to satisfy the majority's state-action test, see ante, at 357.

[*369] I disagree with the majority's position on three separate grounds. First, the suggestion that the State would have to "put its own weight on the side of the proposed practice by ordering it" seems to me to mark a sharp departure from our previous state-action cases. From the Civil Rights Cases, 109 U.S. 3 (1883), to *Moose Lodge*, supra, we have consistently indicated that state authorization and approval of "private" conduct would support a finding of state action.
n2

-----Footnotes-----

n2 In the Civil Rights Cases, the Court suggested that state action might be found if the conduct in question were "sanctioned in some way by the State," 109 U.S., at 17. Later cases made it clear that the State's sanction did not need to be in the form of an affirmative command. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151 (1914); *Nixon v. Condon*, 286 U.S. 73 (1932); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the Court noted that by its inaction, the State had "elected to place its power, property and prestige behind the admitted discrimination," although the State did not actually order the discrimination. See id., at 726-727 (STEWART, J., concurring). And in *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967), the Court based its "state action" ruling on the fact that the California constitutional provision "was intended to authorize, and does authorize, racial discrimination in the housing market." Even in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177 (1972), the Court suggested that if the State's regulation had in any way fostered or encouraged racial discrimination, a state-action finding might have been justified. Certainly this is a less rigid standard than the Court's requirement in this case that the Public Utility Commission be shown to have ordered the challenged conduct, not merely to have approved it.

-----End Footnotes-----

Second, [***495] [*463] I question the wisdom of giving such short shrift to the extensive interaction between the company and the State, and focusing solely on the extent of state support for the particular activity under challenge. In cases where the State's only significant involvement is through financial support or limited regulation of the private entity, it may be well to inquire whether the [*370] State's involvement suggests state approval of the objectionable conduct. See *Powe v. Miles*, 407 F.2d 73, 81 (CA2 1968); *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535, 547-548 (SDNY 1968). But where the State has so thoroughly insinuated itself into the operations of the enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular practice in question.

Finally, it seems to me in any event that the State has given its approval to Metropolitan Edison's termination procedures. The State Utility Commission approved a tariff provision under which the company reserved the right to discontinue its service on reasonable notice for nonpayment of bills.

The majority attempts to make something of the fact that the tariff provision was not challenged in the most recent Utility Commission hearings, and that it had apparently not been challenged before. But the provision had been included in a tariff required to be filed and approved by the State pursuant to statute. That it was not seriously questioned before approval does not mean that it was not approved. It suggests, instead, that the Commission was satisfied to permit the company to proceed in the termination area as it had done in the past. The majority's test puts potential plaintiffs in a difficult position: if the Commission approves the tariff without argument or a hearing, the State has not sufficiently demonstrated its approval and support for the company's practices. If, on the other hand, the State challenges the tariff provision on the ground, for example, that the "reasonable notice" does not meet the standards of fairness that it expects of the utility, then the State has not put its weight behind the termination procedure employed by

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

the company, and again there is no state action. Apparently, authorization and approval would require the [*371]kind of hearing that was held in Pollak, where the Public Utilities Commission expressly stated that the bus company's installation of radios in buses and streetcars was not inconsistent with the public convenience, safety, and necessity. I am afraid that the majority has in effect restricted Pollak to its facts if it has not discarded it altogether. n3

-----Footnotes-----

n3 I cannot accept the majority's characterization of Pollak as not necessarily deciding the state-action question there presented. Ante, at 356. Whatever doubt on that score may have been created by the original opinion has long since been resolved by this Court. See *Evans v. Newton*, 382 U.S. 296, 301 (1966); *id.*, at 319-320 (Harlan, J., dissenting); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 119 (1973) (opinion of BURGER, C. J.); *id.*, at 133 (STEWART, J., concurring).

-----End Footnotes-----

C

[**496] [**464] The fact that the Metropolitan Edison Co. supplies an essential public service that is in many communities supplied by the government weighs more heavily for me than for the majority. The Court concedes that state action might be present if the activity in question were "traditionally associated with sovereignty," but it then undercuts that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the "public function" argument too narrowly. The whole point of the "public function" cases is to look behind the State's decision to provide public services through private parties. See *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946). In my view, utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a "public function."

[*372] I agree with the majority that it requires more than a finding that a particular business is "affected with the public interest" before constitutional burdens can be imposed on that business. But when the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State.

Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized. See *Evans v. Newton*, *supra*, at 298; *H. Friendly*, *The Dartmouth College Case and the Public-Private Penumbra* (1969). Maintaining the private status of parochial schools, cited by the majority, advances just this value. In the due process area, a similar value of diversity may often be furthered by allowing various private institutions the flexibility to select procedures that fit their particular needs. See *Wahba v. New York University*, 492 F.2d 96, 102 (CA2), cert. denied, post, p. 874. But it is hard to imagine any such interests that are furthered by protecting privately owned public utility companies from meeting the constitutional standards that would apply if the companies were state owned. The values of pluralism and diversity are [*373] simply not relevant [***497] when the private company is the only electric company in town.

II

The majority's conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. Elaborate hearings prior to termination might be quite expensive, and for a responsible company there might be relatively few cases in which such hearings would do any good. The solution to this problem, however, is to require only abbreviated

419 U.S. 345, *; 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

pretermination procedures for all utility companies, not to free the "private" companies to behave however they see fit. At least on occasion, utility companies have failed to demonstrate much [**465] sensitivity to the extreme importance of the service they render, and in some cities, the percentage of error in service termination is disturbingly high. See *Palmer v. Columbia Gas Co. of Ohio, Inc.*, 342 F.Supp. 241, 243 (ND Ohio 1972), *aff'd*, 479 F.2d 153 (CA6 1973); *Bronson v. Consolidated Edison Co.*, 350 F.Supp. 443, 448 (SDNY 1972). n4 Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination with a clear indication that a responsible company official can readily be contacted to consider any claim of error.

-----Footnotes-----

n4 In *Bronson*, Judge Tyler noted that the state utility commission had found that 16% of the complaints investigated resulted in adjustments in favor of the customer. 350 F.Supp., at 448 n. 11.

-----End Footnotes-----

III

What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-action [*374] analysis when different constitutional claims are presented. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 190-191 (1970) (BRENNAN, J., concurring and dissenting); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (CA2 1973). Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

I dissent.

REFERENCES:

Supreme Court's view as to applicability, to conduct of private person or entity, of equal protection and due process clauses of the Fourteenth Amendment

16 Am Jur 2d, Constitutional Law 554-557; 64 Am Jur 2d, Public Utilities 62, 63

9 Am Jur Pl & Pr Forms (Rev ed) Electricity, Gas, and Steam, Forms 31 et seq.; 20 Am Jur Pl & Pr Forms (Rev ed), Public Utilities, Forms 129, 133

7 Am Jur Legal Forms 2d, Electricity, Gas, and Steam 95:27, 95:44

USCS, Constitution, 14th Amendment

US L Ed Digest, Constitutional Law 520

ALR Digests, Constitutional Law 441.5

L Ed Index to Annos, Due Process of Law; Public Utilities

ALR Quick Index, Due Process of Law; Electricity and Electric Companies; Public Utilities

Federal Quick Index, Due Process of Law; Electricity, Gas, and Steam ;Public Utilities

Annotation References:

419 U.S. 345, *, 95 S. Ct. 449, **;
42 L. Ed. 2d 477, ***; 1974 U.S. LEXIS 50

Supreme Court's view as to applicability, to conduct of private person or entity, of equal protection and due process clauses of the Fourteenth Amendment. 42 L Ed 2d 922.

Right to cut off supply of electricity or gas because of nonpayment of service bill or charges. 112 ALR 237.

JACRON SALES CO., INC. v. SINDORF
No. 66, September Term, 1975

Court of Appeals of Maryland

276 Md. 580; 350 A.2d 688; 1976 Md. LEXIS 1104

January 8, 1976, Decided

PRIOR HISTORY: [***1]

Certiorari to the Court of Special Appeals of Maryland. Circuit Court for Prince George's County, Bowie, J.

DISPOSITION: Judgment of the Court of Special Appeals affirmed; costs to be paid by appellant.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former employer challenged a judgment from the Court of Special Appeals of Maryland, which reversed a judgment from a circuit court. The circuit court had directed a verdict for the former employer, holding that although appellee former employee had established slander per se, the former employer was protected by a common law conditional privilege which had not been lost because the former employee had failed "to show actual malice."

OVERVIEW: The former employee brought an action against his former employer after he heard a tape recorded conversation between his new boss and a supervisor for the former employer in which the supervisor suggested that the former employee had stolen merchandise from the former employer. The court affirmed the judgment of the court of special appeals, but concluded that the court of special appeals had misapplied case law by holding that it only applied when a private person was defamed as to a matter of general or public interest, and not when the reputation of a private individual was tarnished by a report of a private matter not of general or public concern, that is, a purely private defamation. The court concluded that it should apply to both media and non-media defendants alike, and to both libel and slander. The court then adopted the standard of negligence in purely private defamation, holding that under the negligence standard, truth was no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rested upon the plaintiff; and the plaintiff must meet the standard of the preponderance of the evidence.

OUTCOME: The court affirmed the judgment from the court of special appeals, which had reversed the judgment of the circuit court. Unless a conditional privilege was found to have existed, the former employee should be required at the new trial to establish the liability of the former employer through proof of negligence by the preponderance of the evidence, and may recover compensation for actual injury.

CORE TERMS: defamation, media, conditional privilege, defamatory, malice, common law, yeh, jacron, non-media, general interest, falsity, reckless disregard, negligence standard, fault, libel, punitive damages, public figure, strict liability, slander, constitutional privilege, presumed, defamed, public official, public interest, matter of state law, matters of public, state interest, new trial, defeat, First Amendment

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Common Law Privileges

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN1] In a state libel trial, a public official must establish malice, defined as a knowing falsity or a reckless disregard for the truth, on the part of the publisher to recover damages for defamatory statements concerning the plaintiff's official conduct. The traditional defense of truth does not provide adequate protection to the First Amendment rights of the press.

276 Md. 580, *, 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

Torts: Damages: Compensatory Damages

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] The constitutional privilege articulated in *New York Times* by the U.S. Supreme Court does not extend to defamatory falsehoods concerning an individual who is neither a public official nor a public figure. Rather than expand the *New York Times* standard to falsehoods relating to private persons when made in connection with events of public interest, the Court applied restrictions to the law of libel designed to accommodate freedom of the press with the state's interest in protecting a private person's reputation. The Court held that in cases of defamation of private persons (1) the state may not impose liability without fault, but with that limitation may adopt any other standard of media liability, and (2) in cases where the *New York Times* test of knowing or reckless falsity is not met, the state may permit recovery for "actual injury" but not presumed or punitive damages. Such "actual injury" is not confined to out-of-pocket loss, but may include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN3] A private individual deserves a greater degree of protection than does a public figure because the latter usually has a greater access to the media to rebut defamatory charges and, unlike the private individual, usually has chosen to run the risk of closer public scrutiny.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Strict Liability

[HN4] As a matter of federal constitutional law, those defendants who are protected by *Gertz* are insulated from strict liability, and presumed and punitive damages in any defamation case maintained by a private person.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN5] As a matter of Maryland law, the *Gertz* holding should apply to media and non-media defendants alike, and to both libel and slander. Regardless of constitutional strictures, it would be a bizarre result as a matter of tort law to hold individual defendants liable without fault while the media were liable only for negligence. The standard tort rationale for strict liability is that it serves to spread the cost of injury over all the users of a given product; in short, it is a theory of enterprise liability. Further, an individual's defamatory statement is, on the whole, likely to create a smaller risk of harm than a media publication. Finally, the media are more likely to be aware of the risk of liability, and thus more likely to insure against it.

Torts: Defamation & Invasion of Privacy: Public Disclosure of Private Facts

[HN6] The following standard of negligence must be applied in cases of purely private defamation. One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them. Under the negligence standard for defamation actions, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN7] Proof of fault in cases of purely private defamation must meet the standard of the preponderance of the evidence. This is the quantum of proof ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN8] The Court of Appeals of Maryland defines malice, in part, as the reckless disregard of truth. The conditional privilege may be lost, however, if the plaintiff in a defamation case can show malice, which in this context means not hatred or spite but rather a reckless disregard of truth, the use of unnecessarily abusive language, or other circumstances which would support a conclusion that the defendant acted in an ill-tempered manner or was motivated by ill-will.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

[HN9] The reckless disregard standard now appears to be firmly established in Maryland as a test, albeit not the exclusive test, for abuse of a conditional privilege. This being a higher standard than negligence, the court retains the common law conditional privilege in Maryland which, in a given case may suffice to avoid liability even though the Gertz standard regarding falsity and defamation is met by the plaintiff. It should be noted, however, that in a case where a common law conditional privilege is found to exist, the negligence standard of Gertz is logically subsumed in the higher standard for proving malice, reckless disregard as to truth or falsity, and therefore becomes irrelevant to the trial of the case. Were the plaintiff who is confronted with a conditional privilege incapable of proving the malice necessary to overcome that hurdle, it would be of no consequence that he might have met the lesser standard of negligence.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN10] While the question of whether a defamatory communication enjoys a conditional privilege is one of law for the court, whether it has been forfeited by malice is usually a question for the jury.

COUNSEL: Albert D. Brault, with whom were Brault, Scott & Brault on the brief, for appellant.

Barry J. Nace, with whom were Davis & Nace on the brief, for appellee.

JUDGES: Murphy, C. J., and Singley, Smith, Digges, Levine, Eldridge and O'Donnell, JJ. Levine, J., delivered the opinion of the Court.

OPINIONBY: LEVINE

OPINION: [*581] [**689] We are asked here to determine the extent to which the First and Fourteenth Amendments to the Federal Constitution are applicable to actions for defamation by private individuals against defendants who are not [*582] publishers or broadcasters; alternatively, we shall decide as a matter of state law whether the law of defamation should be changed in view of recent decisions of the Supreme Court. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974). These questions arise from an action for slander brought by appellee, Jack Sindorf (Sindorf), against his former employer, Jacron Sales Co., Inc. (Jacron). When the case came on for trial before[***5] a jury in the Circuit Court for Prince George's County, the court directed a verdict for Jacron at the close of all the evidence. On appeal, the Court of Special Appeals reversed the judgment and remanded the case to the circuit court for a new trial. *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 341 A. 2d 856 (1975). We then granted certiorari.

Early in 1972, Sindorf entered the employ of Jacron, a Philadelphia-based company, as a construction tools salesman. Sindorf submitted a letter of resignation terminating that relationship some 18 months later, and within a few days thereafter began working in a similar capacity for a Maryland company known as the Tool Box Corporation. In his letter of resignation to Jacron, Sindorf had acknowledged that he was in possession of inventory belonging to Jacron worth \$2,451.77, and further stated that although he regarded the material in his possession as part payment of commissions due him, he would return the property "at such time as" he received the sum of \$2,561.50, representing unpaid commissions of \$2,100 and other miscellaneous amounts owed to [**690]him by Jacron. In addition to enclosing invoices for the inventory in [***6] his possession, he expressed his regret at the need for proceeding in such a manner, which was pursuant to the advice of counsel, but noted that his efforts to "collect the money" due him "through normal business channels" had been unsuccessful.

Within two days after he commenced his employment with Tool Box, Sindorf was asked to come from his Pennsylvania home to Maryland for a conference with William R. Brose (Brose), the president of the company. At that meeting, Brose related a recorded telephone conversation between him and one Robert Fridkis (Fridkis), [*583] vice president of Jacron Sales of Virginia, a subsidiary of Jacron, who had never been Sindorf's employer. n1 The tape recording was played for the jury, and a transcript of the dialogue was received in evidence. n2 As related by Brose, the substance of Fridkis' statement was that there were "quite a few cash sales and quite a bit of merchandise that were uncounted [sic] for." This suggested to Brose, according to his testimony, that possibly Sindorf "had taken items, either for possibly for his own use . . . or for a cash sale," i.e., implying that they had been stolen by Sindorf. When confronted by Brose[***7] with Fridkis' statements, Sindorf branded them as untrue; furthermore, despite an "extremely careful" check of the Tool Box inventory entrusted to Sindorf during his nine months of employment, nothing was ever found to be missing. We note that neither in the Court of Special Appeals nor in this Court has appellant contended that Fridkis' statements did not constitute slander per se.

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

-----Footnotes-----

n1 Mr. Fridkis was deceased by the time the case came to trial.

n2 Because of its length, we attach as an appendix to this opinion the relevant part of the transcript.

-----End Footnotes-----

Testimony revealed that Fridkis had placed the call to Brose on instructions from the president of the parent corporation in Philadelphia. Those instructions, however, had not implicated Sindorf in any theft or other criminal conduct. In the president's own words, he told Fridkis:

"... to call the Tool Box and see if Mr. Sindorf was working for them. We explained to Bob how the man had left us, keeping the merchandise in his possession, our merchandise, [***8] and we wanted to verify his employment, whether he was working there while he was still on our payroll or had he just started with Tool Box."

Apparently, when Fridkis reported to the president the outcome of his discussion with Brose, he merely "verified [Sindorf's] employment. . . ."

In directing a verdict for the defendant, the trial court ruled that although Sindorf had established a case of slander [*584] per se warranting its submission to the jury, Jacron was protected by a common law conditional privilege which had not been lost because Sindorf had failed "to show actual malice." Shortly after an appeal had been lodged, the Court of Special Appeals ordered the parties to address their briefs, in part, to the decision in *Gertz v. Robert Welch, Inc.*, supra, which the Supreme Court had handed down on June 25, 1974, more than two months after the trial of this case. The Court of Special Appeals held that Sindorf had presented sufficient evidence of malice to warrant submission of the question of abuse of the common law conditional privilege to the jury, thus compelling a reversal of the circuit court decision. Further, the Court of Special Appeals said[***9] that since the defamatory statements here were of a "purely private" nature, this case was beyond the reach of *Gertz*.

I

Although we too regard this case as one of defamation of a private individual as to [**691] a purely private matter, we think the Court of Special Appeals has misread *Gertz* in concluding that the holding there applies "only when a private individual is defamed as to a matter of general or public interest." 27 Md. App. at 90. No consideration of *Gertz*, however, would be productive without first referring, at the very least, to three prior decisions of the Supreme Court: *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967); and *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971).

At common law, the only defenses available to a publisher of defamatory material were truth and the common law privileges. Then, in its landmark decision in *New York Times*, the Supreme Court held that [HN1] in a state libel trial, a public official must establish "malice," defined as a knowing falsity or a reckless disregard[***10] for the truth, on the part of the publisher to recover damages for defamatory statements [*585] concerning the plaintiff's official conduct. n3 The traditional defense of truth, the Court held, did not provide adequate protection to the First Amendment rights of the press.

-----Footnotes-----

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

n3 In *New York Times* and in later cases, the Supreme Court explicated the meaning of the new standard. The Court held that under the circumstances, the failure of the *New York Times* to check the accuracy of the allegedly libelous advertisement which it had published against news stories in its own files did not establish a reckless disregard for the truth. 376 U.S. at 287-88. Later, in *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity in stating: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Court has made it plain that the *New York Times* test of knowledge of falsity or reckless disregard of the truth is to be distinguished from malice in the sense of ill-will. See, e.g., *Beckley Newspapers v. Hanks*, 389 U.S. 81, 88 S. Ct. 197, 19 L.Ed.2d 248 (1967).

-----End Footnotes-----

[***11]

Three years later, in *Curtis Publishing Co. v. Butts*, supra, n4 another unanimous Court expanded the class of plaintiffs subject to the *New York Times* test to include "public figures." Although Mr. Justice Harlan wrote the opinion for the Court, a majority agreed with Mr. Chief Justice Warren's definition of a public figure, which included not only public officials but also those individuals who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164. The Chief Justice assumed that involvement in public issues or events itself guaranteed access to the means by which defamatory criticism might be controverted.

-----Footnotes-----

n4 A companion case treated in the same opinion was *Associated Press v. Walker*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967).

-----End Footnotes-----

In *Rosenbloom v. Metromedia*, supra, in an opinion joined by only two other members of the Court, Mr. Justice Brennan appeared to extend[***12] the constitutional privilege enunciated in *New York Times* yet another step further by applying it to defamatory falsehoods if the statements concern matters of public or general interest, regardless of the status of the person defamed. n5 The essence of the opinion is this:

"If a matter is a subject of public or general interest, it cannot suddenly become less so merely [*586] because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety" 403 U.S. at 43.

-----Footnotes-----

n5 A total of five opinions were written in *Rosenbloom*.

-----End Footnotes-----

[**692] Subsequent history has proved the separate dissenting opinions of Mr. Justice Harlan and Mr. Justice Marshall more durable than the plurality opinion of Mr. Justice Brennan. Justice Harlan[***13] urged in his dissent in *Rosenbloom* that the *New York Times* privilege should not apply to private persons because of the diminished likelihood of "securing access to channels of communication sufficient to rebut falsehoods." 403 U.S. at 70. To this extent, Mr. Justice Marshall, joined by Mr. Justice Stewart, was in general agreement. The disagreement between the two dissenting opinions was over the matter of punitive damages. Justice Harlan was of the view that the states might

276 Md. 580, *, 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

allow such damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done," 403 U.S. at 75, while Justice Marshall expressed the view that both punitive and presumed damages should not be allowed because they resulted in self-censorship.

Thus was the stage set for Gertz. There, the plaintiff was a Chicago attorney prosecuting a civil action for the family of a youth who had been shot and killed by a police officer. The officer had previously been convicted of second degree murder in the incident, but the plaintiff had neither participated in the criminal proceeding nor discussed the officer with media representatives. Nevertheless, the defendant published an article[***14] characterizing the plaintiff as the "architect of the criminal prosecution" which it portrayed as part of a nationwide Communist conspiracy to discredit local law enforcement agencies. The article falsely accused the plaintiff of membership in Communist-front organizations and of having a criminal record. After a jury had awarded the plaintiff \$50,000 in damages, the trial [*587] court, anticipating Rosenbloom and granting the defendant's motion for a judgment n.o.v., ruled that the New York Times standard should govern even though the plaintiff was neither a public official nor a public figure. On appeal, the United States Court of Appeals upheld the trial court on the ground that, regardless of whether the plaintiff was a public figure, the defamatory statements concerned an issue of significant public interest. *Gertz v. Robert Welch, Inc.*, 471 F. 2d 801 (7th Cir. 1972).

The Supreme Court, with a majority of five, held that [HN2] the constitutional privilege articulated in *New York Times* does not extend to defamatory falsehoods concerning an individual who is neither a public official nor a public figure. Rather than expand the *New York Times* standard to [***15] falsehoods relating to private persons when made in connection with events of public interest, as the *Rosenbloom* plurality had done, the Court applied a number of restrictions to the law of libel designed to accommodate freedom of the press with the state's interest in protecting a private person's reputation. The Court held that in cases of defamation of private persons (1) the state may not impose liability without fault, but with that limitation may adopt any other standard of media liability, and (2) in cases where the *New York Times* test of knowing or reckless falsity is not met, the state may permit recovery for "actual injury" but not presumed or punitive damages. Such "actual injury" was not confined to out-of-pocket loss, but may include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 418 U.S. at 350. After then determining that Gertz was neither a public official nor a public figure, the Court reversed and remanded the case for a new trial.

The Court's shift in emphasis from First Amendment protection of free expression to the state interest in protecting the reputation of the plaintiff who is a [***16] private individual represented a rejection of the rationale underlying the plurality opinion in *Rosenbloom*. In sum, the Court held that [HN3] a private individual deserves a greater degree of protection than does a public figure [**693] because the [*588] latter usually has a greater access to the media to rebut defamatory charges and, unlike the private individual, usually has chosen to run "the risk of closer public scrutiny." 418 U.S. at 344. Thus, the *Rosenbloom* test, whether the matter is of "public or general" concern, did not afford sufficient recognition of the legitimate state interest in enforcing a remedy for injury to a private person's reputation. Additionally, the Gertz Court found the *Rosenbloom* plurality approach unacceptable because it imposed on courts the task of deciding on an "ad hoc" basis what issues were of "general or public interest," a task which the Court doubted the wisdom of committing "to the conscience of judges." 418 U.S. at 346.

The Court of Special Appeals read the Gertz holdings to apply only when a private person is defamed as to a matter of general or public interest, and not when the reputation of a private individual[***17] is tarnished by a report of a private matter not of general or public concern, that is, a purely private defamation. 27 Md. App. at 90. Hence, the court concluded that since the case before it involved neither a public individual confronted with the *New York Times* privilege, nor a matter of public or general interest, it was "free to define the limits of recovery," 27 Md. App. at 90, because "[s]tate law [was] in full force and effect." *Id.* at 93. Accordingly, the Court of Special Appeals did not apply Gertz and, since it was of the view that there was sufficient evidence of common law malice to defeat the conditional privilege protecting the defendant, reversed and remanded for a new trial. We are not fully in accord with these views.

The Court of Special Appeals' conclusion that the Gertz holding applies only where a private person is defamed in regard to a matter of public or general interest finds no support in the Gertz decision itself. To the contrary, the opinion for the Court by Mr. Justice Powell is punctuated with manifestations that the "public or general interest" test was being jettisoned. 418 U.S. at 343-44. The Court stated that the "extension[***18] of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest to a degree that [it found] unacceptable," and [*589]

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

declared that the "'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake." *Id.* at 346. That Gertz was regarded as having rejected the Rosenbloom plurality opinion and as a withdrawal "to the factual limits of the pre-Rosenbloom cases" is confirmed by the concurring opinion of Mr. Justice Blackmun, 418 U.S. at 353, which gave Justice Powell's opinion the approval of a majority, and even more forcefully by Mr. Justice White's dissent where he stated that "[t]he Court now repudiates the plurality opinion in Rosenbloom. . . ." *Id.* at 378-79.

The very essence of the Gertz decision, as we noted early on, was the shift in focus from the protection of free expression, which undergirded New York Times and its progeny, including Rosenbloom, to the state interest in protecting private persons who have been defamed. It was because the Rosenbloom[***19] approach did not afford sufficient recognition of this state interest that the Gertz Court found it unacceptable and sounded the death knell for the "public or general interest" test as a constitutional requirement. See Anderson, *Libel and Press Self-Censorship*, 53 Texas L. Rev. 422, 445 (1975); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 Hastings L. J. 777, 791-92 (1975); Comment, *The Law of Libel -- Constitutional Privilege and The Private Individual: Round Two -- Gertz v. Robert Welch, Inc.*, 12 San Diego L. Rev. 455, 466 (1975); Note, *Gertz v. Welch: Reviving [**694] the Libel Action*, 48 Temp. L. Q. 450, 459 (1975).

The Court of Special Appeals rested its holding that the Gertz rules apply only when a private person is defamed concerning a matter of public or general interest on the rationale of New York Times, that in response to the command of the First Amendment a constitutional privilege is necessary to protect uninhibited public debate. The Court of Special Appeals reasoned that this rationale applies to private persons only when they are defamed in regard to matters[***20] of public or general interest, that public debate is [*590]not fostered when the subject matter is private. As we have stressed, however, this overlooks the gravamen of the Gertz holding embodied in the changing emphasis from the value of uninhibited debate to the state interest in protecting private persons "for the harm inflicted on them by defamatory falsehood." 418 U.S. at 341.

Undeniably, the Gertz holding effects sweeping changes in the law of defamation. The Court seeks to eliminate in cases of private plaintiffs the threat of self-censorship, the very objective of the New York Times rule, but instead of shielding the media from private plaintiffs with the New York Times privilege, it does so by protecting them against strict liability as well as presumed and punitive damages. Beyond this, the states are free to fashion their own rules. We read Gertz to apply to actions brought by private persons regardless of whether the subject matter of the defamation is one of public or general interest. Accordingly, [HN4] as a matter of federal constitutional law, those defendants who are protected by Gertz would be insulated from strict liability, and presumed[***21] and punitive damages in any defamation case maintained by a private person.

II

This case also presents the question whether a non-media defendant, such as Jacron, is within the class of defendants to be afforded the protection of the Gertz holding. n6 It is plain that the holding in Gertz was limited to media expression. See Brosnahan, *supra*, 26 Hastings L. J. at 792-93; Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rutgers-Camden L. J. 471, 507-509 (1975); Nimmer, *Introduction -- Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?* 26 Hastings L. J. 639, 649-50 (1975); see also Restatement (Second) of Torts § [*591] 580B, Comment e (Tent. Draft No. 21, 1975). Apart from the fact that the defendant in Gertz was a member of the media, whose defamatory act consisted of the publication of a libelous statement, the majority opinion is riddled with references to "publishers and broadcasters," "the press and broadcast media," and "the news media." Similar terms appear in the concurring opinion of Justice Blackmun and the dissenting opinions of the Chief Justice[***22] and Justice Brennan. Justice White stands alone in his view that Gertz applies to all defamation actions. We must nevertheless make an informed prediction as to whether at some future date the Supreme Court will extend the Gertz holding to defamatory expression of any kind by non-media defendants. Even if we were to decide here that the Court will not so extend Gertz, we would consider whether, in any event, we should do so as a matter of state law.

-----Footnotes-----

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

n6 While holding that Gertz did not apply to this case because the defamatory remarks here did not concern matters of public or general interest, the Court of Special Appeals nevertheless concluded that Gertz was not limited to media cases.

-----End Footnotes-----

The history of New York Times provides an instructive analogy. Although that case arose in a media context, the holding contained no caveat restricting its application to media publications; nor has the Supreme Court hesitated to apply it in [**695] non-media cases. In *Garrison v. Louisiana* [***23], 379 U.S. 64, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964), the defamatory comments were made during a press conference, and in *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968), they were made during a televised speech. In both instances, the media merely served as a vehicle for the defamatory statements by the defendants and the Court focused on free speech and public debate rather than on the protection of the media. In *Henry v. Collins*, 380 U.S. 356, 85 S. Ct. 992, 13 L.Ed.2d 892 (1965), the Court in a short per curiam opinion applied *New York Times* where an individual who had been arrested by a police chief charged in a letter to a deputy sheriff and in a statement read to several wire services that the arrest was a "diabolical plot." Similarly, in non-media cases arising from labor disputes the Court has found the constitutional privilege applicable. *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966). A number of lower courts have also [**592] applied the *New York Times* standard in non-media cases, n7 and one court has applied [***24] *New York Times* in an action by an officer of a private club for defamations arising out of communications between club members concerning his activities. *Evans v. Lawson*, 351 F. Supp. 279 (W.D. Va. 1972).

-----Footnotes-----

n7 See *Noonan v. Rousselot*, 239 Cal.App.2d 447, 48 Cal. Rptr. 817 (1966) ("tabloid" campaign material); *Rowden v. Amick*, 446 S.W.2d 849 (Kansas City, Mo. App. 1969) (letter writing campaign by a disgruntled citizen to other members of the community attacking a deputy marshal who had ticketed defendant's car); cf. *Richards v. Gruen*, 62 Wis. 2d 99, 214 N.W.2d 309 (1974).

-----End Footnotes-----

Nor do we discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in *New York Times*, *Curtis* and *Gertz* is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, [***25] therefore, obtains in either case. See *Restatement (Second) of Torts* § 580A, Comment h (Tent. Draft No. 21, 1975); but cf. *Nimmer*, *supra*. The proposition that the press enjoys greater rights than members of the public generally was rejected by the Supreme Court in *Pell v. Procunier*, 417 U.S. 817, 834-35, 94 S. Ct. 2800, 41 L.Ed.2d 495 (1974), where a newspaper argued that it had a constitutional right to interview inmates of a state correctional system despite a regulation prohibiting such contacts.

Wholly apart from any possible Supreme Court holding in the future based on constitutional grounds, we conclude [HN5] as a matter of state law that the *Gertz* holding should apply to media and non-media defendants alike, and to both libel and slander. As one commentator stated:

"... Regardless of constitutional strictures, it would be a bizarre result as a matter of tort law to hold individual defendants liable without fault while the media were liable only for negligence. The standard tort rationale for strict liability is that it [**593] serves to spread the cost of injury over all the users of a given product; in short, it is a theory of enterprise liability. [***26] Further, an individual's defamatory statement is, on the whole, likely to create a smaller risk of harm than a media publication. Finally, the media are more likely to be aware of the risk of liability, and thus more likely to insure against it. . . ." *The Supreme Court*, 1973 Term, 88 Harv. L. Rev. 41, 148 n. 52 (1974).

276 Md. 580, *, 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

Any rule according less favorable treatment to certain types of non-media defendants might well present "difficult questions concerning the roles of the press and other speakers in our society." Anderson, *supra*, 53 Texas L. Rev. at 442-43 n. 95. Furthermore, [**696] most non-media private defamations arise in the context of one of the common law privileges; "[t]he completely gratuitous private defamation is rare." Thus, experience suggests that liability without fault is unusual in non-media private defamation cases. Frakt, *supra*, 6 Rutgers-Camden L. J. at 511.

Yet another reason for applying the Gertz holding to non-media defendants and to slander as well as libel is the compelling need for consistency and simplicity in the law of defamation. To limit the Gertz principles to media defendants and to cases of libel would mean one test, [***27] that of New York Times, for defamation of public officials and figures; another, which imposes a greater degree of proof than strict liability, and bans presumed and punitive damages, for cases brought by private plaintiffs against media defendants; and at least one more based on existing common law principles for all other defamation, an area of tort law which, wholly apart from the advent of constitutional considerations, has traditionally been noted for its complexity. The rationale for applying the Gertz holding to non-media defendants and to slander as well as libel is aptly stated in the Restatement (Second) of Torts § 580B, Comment e (Tent. Draft No. 21, 1975):

"... As the Supreme Court declares, the protection of the First Amendment extends to [*594] freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual[***28] private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

"... There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant."

III

We hold, therefore, that the rules announced in Gertz apply to cases of libel and slander alike brought against non-media defendants. Consequently, the principles of Gertz are applicable to the instant case. We must here decide, however, the standard of liability which should govern this case, recognizing that there cannot be recovery on strict liability. While holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability," 418 U.S. at 347, the Gertz Court left little doubt of its assumption that most states would adopt a negligence standard. At one point, the Court stated: "Our inquiry would [***29] involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.* at 348 (emphasis added). In prohibiting punitive damages, the Court stated that such "damages are wholly [*595] irrelevant to the state interest that justifies a negligence standard for private defamation actions." *Id.* at 350. Justice Blackmun, concurring, flatly states that "the Court now conditions a libel action by a private person upon a showing of negligence . . .," *id.* at 353, and Chief Justice Burger characterizes the majority opinion as introducing to defamation law the concept of "negligence," *id.* at 355. Justice [**697] Brennan refers to "a reasonable-care standard," *id.* at 366, and Justice White's dissent contains similar language.

Nevertheless, we are free to adopt a stricter standard than negligence. In the wake of the Gertz decision, courts in Colorado, *Walker v. Colorado Springs Sun, Inc.*, Colo., 538 P. 2d 450 (1975), cert. denied, 96 S. Ct. 469 (1975), and in Indiana, *Aafco [***30] Heating & Air Con. Co. v. Northwest Pub., Inc.*, 321 N.E.2d 580 (Ind. App. 1974), both media-defendant and private-plaintiff cases, have opted, as a matter of state law, for the adoption of the New York Times standard of knowing falsity or reckless disregard, but only where the defamatory matter is of public or general interest. n8 The Supreme Court of Illinois, however, in *Troman v. Kingsley Wood, Ill.*, 340 N.E.2d 292 (1975), a case involving a media defendant and a private plaintiff, chose a standard of negligence. And in another case decided after Gertz, in which a private plaintiff alleged a defamation by a media defendant, a negligence standard was adopted "even though the libel occurred in the reporting of an event of public or general concern." *Stone v. Essex County Newspapers, Inc.*, Mass., 330 N.E.2d 161, 164 (1975). Cf. *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P. 2d 76 (1975) (negligence standard adopted in case of private plaintiff and media defendant for defamation in reporting judicial proceedings).

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

-----Footnotes-----

n8 It is interesting to note that since both cases involved matters of public or general interest, the courts confined their holdings to that context and offered no hint as to what test they would adopt in other cases. Suffice it to say that any standard less than negligence in media-defendant cases not presenting matters of public or general interest would clearly run afoul of Gertz as a matter of federal constitutional law.

-----End Footnotes-----

[***31]

[*596] In the only other post-Gertz case, of which we are aware, that has considered the question, the Wisconsin Supreme Court, in *Calero v. Del Chemical Corp.*, 68 Wisc. 2d 487, 228 N.W.2d 737 (1975), a case which also involved a defamation suit by a private individual against his former employer and thus not involving the media, retained its common law test. It concluded that Gertz, by its own terms, did not literally apply because of the non-media defendant context presented in the Wisconsin case. We decline to follow that authority, since the court there simply limited its examination to the question of whether it was bound by Gertz.

The adoption of a negligence standard in cases of purely private defamation hardly introduces a radical concept to tort law. The application of the negligence standard in tort cases is so well established that juries can safely be expected to comprehend the term when applied in defamation cases. Nor is the negligence standard unknown to common law defamation. In some jurisdictions, the lack of a reasonable ground to believe in the truth of a published statement is deemed sufficient to defeat a common law conditional privilege. [***32] See 1 F. Harper & F. James, *Law of Torts* § 5.27 n. 16 (1956), and the cases therein cited; *Restatement of Torts* § 601 (1938). And in connection with the issue of publication, the usual rule of strict liability has been relaxed in favor of a negligence standard. W. Prosser, *Law of Torts* § 113 (4th ed. 1971).

We hold, therefore, [HN6] that a standard of negligence, as set forth in *Restatement (Second) of Torts* § 580B (Tent. Draft No. 21, 1975), which we here adopt, must be applied in cases of purely private defamation. Section 580B states:

"§ 580B. DEFAMATION OF PRIVATE PERSON.

"ONE WHO PUBLISHES A FALSE AND DEFAMATORY COMMUNICATION CONCERNING A PRIVATE PERSON, OR CONCERNING A PUBLIC OFFICIAL OR PUBLIC [**698] FIGURE IN RELATION TO A PURELY PRIVATE MATTER NOT AFFECTING HIS CONDUCT, FITNESS OR ROLE IN HIS PUBLIC CAPACITY, IS [*597] SUBJECT TO LIABILITY, IF, BUT ONLY IF, HE

"(a) KNOWS THAT THE STATEMENT IS FALSE AND THAT IT DEFAMES THE OTHER,

"(b) ACTS IN RECKLESS DISREGARD OF THESE MATTERS, OR

"(c) ACTS NEGLIGENTLY IN FAILING TO ASCERTAIN THEM."

It is to be noted that under the negligence standard which we adopt here, truth is no longer[***33] an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity.

We turn, then, to the quantum of proof by which the plaintiff must establish the fault of the defendant. We address the question merely to dispel any possible notion that the plaintiff must prove negligence by "clear and convincing" evidence. The "clear and convincing" test, applied in the public-official and public-figure sphere, apparently derives from the New York Times requirement of "convincing clarity," 376 U.S. at 285-86, with respect to the "actual malice" standard articulated there. See *Rosenbloom v. Metromedia*, supra, 403 U.S. at 30. The Gertz opinion, however, does not suggest that the standard of clear and convincing proof must be applied in the negligence context, saying only that the states may adopt any standard except strict liability.

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

[HN7] We hold that proof of fault in cases of purely private defamation must meet the standard of the preponderance of the evidence. This is the quantum of proof ordinarily required in other types[***34] of actions for negligence, and is apt to be more readily understood by juries.

IV

Essential to the disposition of this case is the status of the common law conditional privileges in Maryland, especially in light of Gertz. As we indicated earlier, the trial judge directed a verdict for Jacron on the ground that Sindorf had [*598] failed to present sufficient evidence of "actual malice" to defeat the common law privilege protecting Jacron. In reversing, the Court of Special Appeals held that "the question of malice was properly for the jury." Sindorf v. Jacron Sales Co., supra, 27 Md. App. at 72.

It has been suggested that adoption of the negligence standard of fault in defamation cases would have the practical effect of rendering obsolete the common law defense of conditional privilege. See, e.g., Anderson, supra, 53 Texas L. Rev. at 443, n. 97; Frakt, supra, 6 Rutgers-Camden L. J. at 496-97. The reasoning which underlies this position is that many jurisdictions follow the rule that one of the means by which a conditional privilege may be defeated is by proving negligence on the part of the defendant. F. Harper & F. James, supra, § 5.27; W. Prosser, [***35] supra, § 115. Indeed, the first Restatement of Torts, supra, at § 601 expressly adopted such a rule:

"Except as stated in § 602, one who upon a conditionally privileged occasion publishes false and defamatory matter of another abuses the occasion if, although believing the defamatory matter to be true, he has no reasonable grounds for so believing."

Section 601 thus embodied the common law rule that one was held to have abused a qualified privilege if he did not believe the statement to be true or if he did not have reasonable grounds to believe in its truth. See Restatement (Second) of Torts [*699] § 580B, Comment 1 (Tent. Draft No. 21, 1975).

If the rule stated in § 601 of the first Restatement were the law of Maryland, we might well question the efficacy of retaining a conditional privilege defeasible by the very proof of negligence which must be presented to establish falsity and defamation in the first instance. The fault required by Gertz to be proved to establish liability would amount to an abuse of, and thereby defeat, a conditional privilege. In Maryland, however, we have never held that negligence is [*599] among the grounds[***36] on which the conditional privilege may be forfeited. n9

-----Footnotes-----

n9 We reject any suggestion to the contrary in the dicta in Simon v. Robinson, 221 Md. 200, 206, 154 A. 2d 911 (1959).

-----End Footnotes-----

The Maryland cases on abuse of conditional privilege are couched in terms of "express malice" or "actual malice." See, e.g., Evening News Co. v. Bowie, 154 Md. 604, 611, 141 A. 416 (1928); Jump v. Barnes, 139 Md. 101, 111, 114 A. 734 (1921); Bavington v. Robinson, 124 Md. 85, 90, 91 A. 777 (1914); Garrett v. Dickerson, 19 Md. 418, 450 (1863). The explanation in some of the earlier cases was that malice is an element of the tort of defamation, but is generally presumed in the publication of defamatory matter unless a privilege is established, in which event the presumption is rebutted and malice must be proved. See Fresh v. Cutter, 73 Md. 87, 92, 20 A. 774, 25 Am.St.Rep. 575, 10 L.R.A. 67 (1890). Malice was variously defined in the cases as a lack of good faith, ill-will, hostility, or hatred. See, e.g., Evening News [***37] Co. v. Bowie, supra; Deckelman v. Lake, 149 Md. 533, 536, 131 A. 762 (1926). Excessive publication and unnecessarily abusive language were held to be evidence of malice. Fresh v. Cutter, supra, 73 Md. at 93-94.

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

Express or actual malice represents something more than conduct that is merely negligent. In *Deckelman v. Lake*, supra, the Court, quoting from 17 R.C.L. 321, defined malice as "wanton disposition grossly negligent of the rights of others." Speaking generally in *Fresh v. Cutter*, supra, 73 Md. at 92, the Court defined malice as "knowingly stat[ing] what was untrue and injurious," but more specifically in *Stevenson v. Baltimore Club*, 250 Md. 482, 243 A. 2d 533 (1968), [HN8] we defined malice in part as the reckless disregard of truth:

"The privilege may be lost, however, if the plaintiff in a defamation case can show malice, which in this context means not hatred or spite but rather a reckless disregard of truth, the use of unnecessarily abusive language, or other circumstances which would support a conclusion that the [*600] defendant acted in an ill-tempered manner or was motivated by ill-will." 250 Md. at 486-87 (emphasis added).

We repeated[***38] the *Stevenson* definition in *Orrison v. Vance*, 262 Md. 285, 295, 277 A. 2d 573 (1971), and thus [HN9] the reckless disregard standard now appears to be firmly established in Maryland as a test, albeit not the exclusive test, for abuse of a conditional privilege. This being a higher standard than negligence, we retain the common law conditional privilege in Maryland which, in a given case may suffice to avoid liability even though the Gertz standard regarding falsity and defamation is met by the plaintiff. n10 It should be noted, however, [**700] that in a case where a common law conditional privilege is found to exist, the negligence standard of Gertz is logically subsumed in the higher standard for proving malice, reckless disregard as to truth or falsity, and therefore becomes irrelevant to the trial of the case. Were the plaintiff who is confronted with a conditional privilege incapable of proving the malice necessary to overcome that hurdle, it would be of no consequence that he might have met the lesser standard of negligence.

-----Footnotes-----

n10 It is interesting to note that the rule of the first Restatement quoted earlier has now been supplanted in the Restatement (Second) of Torts § 600 (Tent. Draft No. 21, 1975), which provides that abuse of a conditional privilege takes place when the defendant publishes a statement knowing it to be false or acting in reckless disregard as to its truth or falsity. This is the same as the constitutional standard used for determining whether liability will be imposed for a defamatory communication about a public officer or public figure. In sum, negligence is no longer sufficient under the Restatement to establish abuse of a conditional privilege.

-----End Footnotes-----

[***39]

[HN10] While the question of whether a defamatory communication enjoys a conditional privilege is one of law for the court, whether it has been forfeited by malice is usually a question for the jury. *Hanrahan v. Kelly*, 269 Md. 21, 29, 305 A. 2d 151 (1973); *Jump v. Barnes*, supra, 139 Md. at 112; *Bavington v. Robinson*, supra, 124 Md. at 90; *Fresh v. Cutter*, supra, 73 Md. at 93. We need not belabor this opinion with a detailed summary of the trial testimony. We agree with the Court of Special Appeals that the trial court erred in ruling that there was insufficient evidence of malice, as [*601] defined in our cases, to defeat the conditional privilege. Reasonable minds could have concluded that the suggestion of Sindorf's discharge for stealing was not only false, but far exceeded the facts that had been related to Fridkis by the corporation president who had done little more than instruct him to verify Sindorf's employment. This was evidence on which a finding by the trier of fact of malice in the form of reckless disregard of truth overcoming the conditional privilege could have been based. Hence, the Court of Special Appeals was correct in reversing the judgment[***40] of the circuit court and in remanding the case for a new trial.

Unless a conditional privilege is found to have existed, the plaintiff shall be required at the new trial of this case to establish the liability of the defendant through proof of negligence by the preponderance of the evidence, and may recover compensation for actual injury, as defined in *Gertz* and outlined earlier, but neither presumed nor punitive damages, unless he establishes liability under the more demanding New York Times standard of knowing falsity or reckless disregard for the truth. Should the court determine that a common law conditional privilege existed, the question of its forfeiture vel non shall be governed by the views expressed herein.

Judgment of the Court of Special Appeals affirmed; costs to be paid by appellant.

APPENDIX

* * *

"Mr. Fridkis: you know, anyway, okey listen, I want to talk to you about your new salesman, Jack Sindorf
"Mr. Brose: yeh
"Mr. Fridkis: ah, ah
"Mr. Brose: he's been working the Ocean City area
"Mr. Fridkis: yeh, you know he, he use to work for Jacron
[*602] "Mr. Brose: understand in Philadelphia
"Mr. Fridkis: yeh, Philadelphia and, ah, [***41] there was quite a few cash sales and quite a bit of merchandise that was not accounted for
"Mr. Brose: Oh really
"Mr. Fridkis: yeh, so I figured I'd, you know
"Mr. Brose: Oh good heavens
"Mr. Fridkis: So I thought I'd better kind of tip you off about it, you know, watch your stock real, real carefully on trucks and things
"Mr. Brose: yeh
"Mr. Fridkis: when did you hire him, how long
[**701] "Mr. Brose: I think today, no officially yesterday I guess
"Mr. Fridkis: Oh, officially yesterday
"Mr. Brose: uh huh
"Mr. Fridkis: Oh, okey cause, ah, ah, someone here says he's been working for you three or four, ah, ah, weeks
"Mr. Brose: God, I never met him that long ago
"Mr. Fridkis: o.k., o.k.
"Mr. Brose: I think, I think the first time I met him was about Thursday or Friday over the phone
"Mr. Fridkis: ah, huh, ah
"Mr. Brose: and he was down yesterday morning and we had a chat and decided he'd like to represent The Tool Box in that area, he said that he'd been working for Jacron in Philadelphia
"Mr. Fridkis: yeh, yeh, well this was what the story was on it and
"Mr. Brose: what, did he get fired
"Mr. Fridkis: ah, yeh, yeh, they were, ah, ah, noticing things, you know what [***42] I mean
"Mr. Brose: Oh boy
[*603] "Mr. Fridkis: ah, noticing things that, ah, ah, were, ah, some checks came in that were made out to him, you know what I mean
"Mr. Brose: ah huh
"Mr. Fridkis: you know, and ah, ah, they were noticing some stuff that was disappearing and he had about \$3000 worth of merchandise on the truck and ah, when they turned the things in it just didn't jive
"Mr. Brose: didn't jive, yeh
"Mr. Fridkis: yeh
"Mr. Brose: good heavens
"Mr. Fridkis: yeh, and well you know, little things, ah, ah, that he had, you know how guys take stuff out of the place there and he doesn't turn a ticket in on it, you know what I mean
"Mr. Brose: oh, oh
"Mr. Fridkis: in other words, odd ball stuff, you know, hey he took out three tools there and, ah, that was three weeks ago and we don't have a ticket on it
"Mr. Brose: oh, oh
"Mr. Fridkis: you know, like what happened to the ticket
"Mr. Brose: I think we have pretty good inventory control. I think, well, ah, we can't watch everything, you and I both know that but you just
"Mr. Fridkis: yeh, well I just, you know, just tipped you off
"Mr. Brose: I appreciate it
"Mr. Fridkis: and kind of watch him very, very carefully[***43] so far as this is concerned
"Mr. Brose: Thank you Buddy

276 Md. 580, *; 350 A.2d 688, **;
1976 Md. LEXIS 1104, ***

"Mr. Fridkis: you know, see whats what, he did a lot of business and this is not a drop for him. Now when he first went out there he was [*604] doing all kinds of business, then as the months went by his business started to get less and less

"Mr. Brose: oh

"Mr. Fridkis: got it, . . .

* * *

"Mr. Fridkis: I tipped you off on this thing you know

"Mr. Brose: yeh, well I sure appreciate your telling me and letting me know about that

[**702] "Mr. Fridkis: Well I was curious to see when he started working for you. Had he been working for you at the same time he was working for Jacron in Philadelphia

"Mr. Brose: Ah

"Mr. Fridkis: got it, got it

"Mr. Brose: Unless he's still on their payroll now, I understand that he was

"Mr. Fridkis: No, no, he's not on the payroll, he was even fired last week I believe, got it

"Mr. Brose: Oh, he told me he was not on their payroll and there was not a written contract or anything so he was open, he was available so

"Mr. Fridkis: yeh, yeh

"Mr. Brose: He seemed like a real nice guy, real nice fellow

"Mr. Fridkis: Well just keep an eye on him that's all and ah, that's all I can [***44]say as far as that goes

"Mr. Brose: Thanks Bob

"Mr. Fridkis: I think I just met the guy personally a few times, I don't really know him. Well I was just talking to Jack and he asked me about it. He was working for you cause he had heard that he had told someone that he [*605] had been working for you three or four weeks, you know

"Mr. Brose: No, if he had been working for anybody it wasn't The Tool Box

"Mr. Fridkis: o.k., that's all

"Mr. Brose: If he was, then he and Freddie had something going on the side. I didn't know him that long ago. In fact, it was Thursday or Friday that I talked to him the first time."

* * *

CARL D. JOHNSON, APPELLANT, v. JOHNSON PUBLISHING CO., INC., APPELLEE
No. 5247

District of Columbia Court of Appeals

271 A.2d 696; 1970 D.C. App. LEXIS 370

September 14, 1970, Argued
December 16, 1970, Decided

PRIOR HISTORY: [**1]

Appeal from the District of Columbia Court of General Sessions

DISPOSITION: Reversed and remanded for new trial.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant claimant brought a libel action against appellee publishing company. Following a jury trial, the District of Columbia Court of General Sessions entered a judgment in favor of the publishing company. The claimant appealed.

OVERVIEW: The claimant asserted that he and his family were injured when the publishing company published an article stating that his wife had filed for divorce because he had physically abused her and their children. In its instructions to the jury, the trial court charged, over objection, that the burden was on the claimant to establish by a preponderance of the evidence that he had been libeled. On appeal, the court reversed the judgment entered in favor of the publishing company and remanded the case for a new trial. According to the court, the trial court erred when it instructed the jury. The court found that the words published were libelous per se because they accused the claimant of a crime. The court also recognized that a qualified privilege extended to reports of charges contained in pleadings filed in court. Thus, the court concluded that, on remand, its holding that the publication in question was libelous per se left for the jury the questions of whether the publication was true or, if not true, whether absent proof of malice, it was privileged in law as a fair and substantially accurate repetition of the allegations in the divorce complaint.

OUTCOME: The court reversed the judgment entered in favor of the publishing company and remanded the case for a new trial.

CORE TERMS: defamatory, qualified privilege, republication, beat, convert, libelous, divorce, judicial action, repetition, privileged, publish, malice, reasonable interpretation, new trial, mate, groundless, newspaper, beating, cruelty, libel

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Libel

[HN1] A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. The publication is to be read as a whole, for the law does not strip words to their minimum meaning and ignore their implications. It does not ignore their context. If after an examination of the entire article there is only one reasonable interpretation of its meaning, it is for the judge and not the jury to say whether or not the words are defamatory.

Torts: Defamation & Invasion of Privacy: Libel

[HN2] To accuse one of a crime is libel per se.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN3] Despite the weight of authority holding that the defense of qualified privilege does not attach to pleadings which have been filed in court but upon which no judicial action has been taken, the District of Columbia Court of Appeals thinks that the more persuasive and realistic approach is to the contrary and agrees with the decision which upholds the claim of privilege to report charges made in pleadings on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings.

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN4] The District of Columbia Court of Appeals follow the minority view that a qualified privilege extends to reports of charges contained in pleadings filed in court.

COUNSEL: James B. Gilbert for appellant.

Belford V. Lawson, Jr. for appellee.

JUDGES: Hood, Chief Judge, and Kelly and Gallagher, Associate Judges.

OPINIONBY: KELLY

OPINION: [*697] The October 6, 1966 issue of Jet magazine, one of appellee's publications, contained the following article:

MATE COULDN'T CONVERT FAMILY, BEATS THEM: WIFE

In Washington, D.C., Mrs. Helen M. Johnson sought a divorce on grounds of cruelty after accusing her husband, Carl D. Sr., of beating his family when he failed to convert them to his religious beliefs. Mrs. Johnson alleged that subsequent to the marriage, her husband joined the Jehovah's Witnesses and later tried to convert her and the children. When he failed to convert the family, Johnson's wife said he beat and chased the oldest boy from home and punished another son until a daughter became hysterical. According to court records, Mrs. Johnson left her mate last Aug. 5, to escape further punishment.

Appellant, Carl D. Johnson, brought a libel action against the appellee publishing company claiming that he and his family were injured[**2] by the article.

In his instructions to the jury the trial judge charged, over objection, that the burden was on the plaintiff (appellant) to establish by a preponderance of the evidence that he had been libeled. In our judgment, however, the words published were libelous per se and it was error for the trial judge not to so instruct. We therefore reverse and remand for a new trial.

For many years this jurisdiction has followed the rule that "[HN1] a] publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it." n1 The publication is to be read as a whole, for "[the] law does not strip words to their minimum meaning and ignore their implications. It does not ignore their context." n2 If after an examination of the entire article there is only one reasonable interpretation of its meaning, it is for the judge and not the jury to say whether or not the words are defamatory. n3

-----Footnotes-----

n1 Commercial Publishing Co. v. Smith, 149 F. 704, 706 (6th Cir. 1907), quoted with approval in Washington Post Co. v. Chaloner, 250 U.S. 290, 293, 39 S. Ct. 448, 63 L. Ed. 987 (1919); Washington Times Co. v. Hines, 55 App.D.C. 326, 327, 5 F.2d 541, 542 (1925). See also Williams v. Anti-Defamation League of B'Nai B'Rith, 88 U.S.App.D.C. 99, 101, 185 F.2d 1005, 1007 (1950); Sullivan v. Meyer, 67 App.D.C. 228, 229, 91 F.2d 301, 302 (1937).

[**3]

n2 *Gariepy v. Pearson*, 92 U.S.App.D.C. 337, 338, 207 F.2d 15, 16, cert. denied, 346 U.S. 909, 98 L. Ed. 407, 74 S. Ct. 241 (1953).

n3 *Baker v. Warner*, 231 U.S. 588, 594, 58 L. Ed. 384, 34 S. Ct. 175 (1913); *Washington Times Co. v. Hines*, supra note 1. See also *Lane v. Washington Daily News*, 66 App.D.C. 245, 247, 85 F.2d 822, 824 (1936); *Levy v. American Mut. Liab. Ins. Co.*, D.C.App., 196 A.2d 475, 476 (1964).

-----End Footnotes-----

Applying the above principles to this case, we are of the opinion that the article before us has but one reasonable interpretation: that appellant beat his family -- his wife and children -- and that these beatings resulted in his wife's filing for divorce on the ground of cruelty. n4 The language of the article is thus defamatory since it imputes to appellant "conduct that would render him liable to punishment, or make him odious, infamous, or ridiculous." n5 [*698] The words used charge an assault, a crime, and [HN2] to accuse one of a crime is libel per se. n6

-----Footnotes-----

n4 The order of the words in the caption along with the punctuation, while tending to be confusing, does not cloud the clear inference that the husband beat his wife and children -- in other words, his family. [**4]

n5 *Chaloner v. Washington Post Co.*, 36 App.D.C. 231, 233 (1911), rev'd on other grounds, 250 U.S. 290, 39 S. Ct. 448, 63 L. Ed. 987 (1919).

n6 *Brooker v. Coffin*, 5 Johns. 188, 4 Am.Dec. 337, as quoted in *Warner v. Baker*, 36 App.D.C. 493, 499 (1911), rev'd on other grounds, 231 U.S. 588, 58 L. Ed. 384, 34 S. Ct. 175 (1913). The mere assertion of marital discord has been held to be libelous. *Thackrey v. Patterson*, 81 U.S.App.D.C. 292, 293, 157 F.2d 614, 615 (1946).

-----End Footnotes-----

We are also of the opinion that the charge to the jury should not have included an instruction on the defense of fair comment on a matter of public interest. The defamatory article in this case is a purported republication of allegations contained in a complaint for divorce filed by appellant's wife. Aside from the defense of truth, the question is whether or not the publication, taken as a whole, was a fair and substantially correct repetition of these allegations and thus privileged. *Washington Times Co. v. Hines*, 55 App.D.C. 326, 5 F.2d 541 (1925). If the publication fairly and accurately repeats the wife's assertions as[**5] contained in the complaint, the defense of qualified privilege is available to appellee absent proof that the article was published with malice. If not, there is no qualified privilege.

Appellant argues that the defense of qualified privilege is not available to appellee in any event in light of the many authorities which hold that the privilege to publish reports of judicial proceedings does not arise until some official action in connection therewith has been taken by a magistrate or by the court. *Pittsburgh Courier Pub. Co. v. Lubore*, 91 U.S.App.D.C. 311, 312, 200 F.2d 355, 356 (1952). n7 The question of whether or not the privilege covers republication of charges made in pleadings is said to be open in this jurisdiction, *Washington Times Co. v. Bonner*, 66 App.D.C. 280, 284, 86 F.2d 836, 840, n.2 (1936), although the defense has been successfully raised in at least one such suit without discussion of the issue. *Washington Times Co. v. Hines*, supra. [HN3] Despite the weight of authority holding that the defense of qualified privilege does not attach to pleadings which have been filed in court but upon which no judicial

action has been taken, we nevertheless think that the more[**6] persuasive and realistic approach is to the contrary. We agree with the court in *Campbell v. New York Evening Post*, 245 N.Y. 320, 157 N.E. 153 (1927), n8 which upheld the claim of privilege to report charges made in pleadings on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings. Otherwise, the court said: n9

The incongruous result follows that a newspaper may freely, if without actual malice, publish the contents of a complaint, if it has been read and filed on an ex parte application for an injunction, an order of arrest, an attachment, or an order of publication, yet, if the complaint has merely been filed as a public document in a public office, the newspaper which publishes its contents runs the risk of repeating a libel. * * *

-----Footnotes-----

n7 Of course, relevant statements in pleadings are absolutely privileged as between the parties, *Geier v. Jordan*, D.C.Mun.App., 107 A.2d 440 (1954), and between a party and third persons not parties to the suit. *Brown v. Shimabukuro*, 73 App.D.C. 194, 118 F.2d 17 (1941); *Young v. Young*, 57 App.D.C. 157, 18 F.2d 807 (1927). [**7]

n8 Cf. *American Dist. Tel. Co. v. Brink's Inc.*, 380 F.2d 131 (7th Cir. 1967). This holding does not apply to domestic relation cases in New York only because the record of a matrimonial proceeding is, by statute, secret and confidential. *Shiles v. News Syndicate Co.*, 27 N.Y.2d 9, 261 N.E.2d 251, 313 N.Y.S.2d 104 (1970).

n9 157 N.E. at 155.

-----End Footnotes-----

There is always the possibility that groundless suits may be filed and immediately dismissed after the defamatory allegations have been given wide circulation, but the logic of preventing the republication of what may be groundless defamatory allegations of a complaint when filed, [*699] yet allowing such republication the moment trial begins or any other judicial action is taken, however slight, is to us totally unconvincing. [HN4] We therefore follow the minority view that a qualified privilege extends to reports of charges contained in pleadings filed in court.

Our holding that the publication here in question is libelous per se leaves for the jury the questions of whether the publication is true or, if not true, whether, absent proof of malice, [**8] it is privileged in law as a fair and substantially accurate repetition of the allegations of the complaint. n10

-----Footnotes-----

n10 In light of the fact that this case must be retried, we do not discuss the remaining allegations of error.

-----End Footnotes-----

Reversed and remanded for new trial.

ALEXANDER KILGOUR vs. THE EVENING STAR NEWSPAPER CO.
[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

96 Md. 16; 53 A. 716; 1902 Md. LEXIS 134

November 21, 1902, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court for Montgomery County (MCSHERRY, C. J., HENDERSON and MOTTER, JJ.)

DISPOSITION: Judgment affirmed.

CORE TERMS: duty, libelous, inquest, motive, innuendo, libel, recommend, impute, baby, stifling, corrupt, profession, actionable, announced, declaration, outrage, touch, incapacity, suspected, demurrer, autopsy, arrest, spoken, public officer, announcement, malfeasance, mysterious, colloquium, perverted, corruptly

HEADNOTES: Libel -- Criticism of a Public Officer When Libelous per se -- Charges Not Relating to Duties of Officer -- Innuendo.

A publication criticising the conduct of a public officer, such as a State's Attorney, is not libelous per se unless it imputes lack of integrity or corrupt motives to him, or charges him with incapacity or unfitness for the office.

It is a question of law for the Court whether the innuendo in a declaration for libel is fairly warranted by the language used.

The publication must be considered as a whole in order to ascertain if it is libelous per se.

An article in defendant's newspaper narrated that a baby had died at a certain place under suspicious circumstances; that the coroner and State's Attorney had been notified and the latter ordered the arrest of the mother of the child; that about the time appointed for an inquest the State's Attorney met the physician who had seen the baby soon after its death, and the State's Attorney then informed the sheriff that if an autopsy was held he would refuse to recommend the payment of the bill for expenses and that he afterwards directed the mother of the child to be released from custody; that a certain named man had denounced this conduct as an outrage on the part of the State's Attorney, and that many citizens were agitated on account of the alleged stifling by him of an investigation of a mysterious death. In an action of libel by the State's Attorney, held, upon demurrer to the declaration, that this publication is not libelous per se since it does not contain any injurious reflection upon the motives or capacity of the plaintiff as State's Attorney, or allege that he corruptly perverted the course of justice by stifling a prosecution, but the reasonable inference from the publication is that after consultation with a physician the State's Attorney deemed an inquest unnecessary.

Criticism of the conduct of a public officer in matters outside the scope of his public duties does not touch him as an officer and is not actionable defamation, unless it contains words actionable per se when relating to a private person or there is proof of special damage.

A State's Attorney has no power or duty to regulate the expenses of a coroner holding an inquest, and consequently a publication charging that a State's Attorney announced that if a certain autopsy were held he would not recommend the payment of the coroner's fees, does not affect the State's Attorney in his official capacity, but only as a private person.

A count in the declaration set forth the alleged libel to the effect that the plaintiff, the State's Attorney of the county, appeared at a hearing held by a Justice of the Peace, to investigate the mysterious death of a child and announced that he would not recommend the payment of any expenses incurred in making an autopsy, and that the proceedings were a little

96 Md. 16, *, 53 A. 716, **;
1902 Md. LEXIS 134, ***

later brought to a close; and the count then set forth the following innuendo; meaning thereby that the plaintiff wantonly, wilfully, corruptly and by malfeasance in the discharge of his official duties as State's Attorney stifled and prevented all proper inquiry as to the cause of the death of a two-months-old child and thereby perverted the ends of justice. Held, that this innuendo, not being supported by a colloquium, cannot be taken to expand or alter the natural meaning of the words actually used, and that since these words are not actionable per se, this count is bad upon demurrer.

COUNSEL: W. V. Bouic and E. C. Peter, for the appellant.

Assuming the statement of the article to be true, it was the duty of the State's Attorney to see that an inquest was held; to give the justice and the deputy sheriff, in the course of the investigation, the full benefit of the skill and experience, which as State's Attorney he should have possessed; to cause Bessie Sellman to be held until the mystery was cleared up; and, if the investigation disclosed probable cause to believe a murder had been committed, to use his best efforts to bring those to whom the evidence pointed as the guilty ones to trial. If such was his duty and he appeared at the time and place set for the purpose of having the inquest proceed, and almost immediately after his arrival, without any apparent cause or deigning any explanation, abandoned the case, and by a threat which may have been impotent, but which proved effective, prevented those it was his duty to assist and encourage, from proceeding with an investigation it was their duty to pursue, and then stretched his authority beyond its [***2] limits to hastily free from jail one properly committed to await the investigation of a suspected murder, he was justly liable to the charge of having stifled, using the words in the offensive sense in which it is ever used when applied to official conduct, the investigation of the mysterious death of Bessie Sellman's baby.

If, by assuming the facts set forth in the article to be true, it so clearly points to official misconduct and incapacity, it must follow, when the appellee, by its demurrer, admits that those facts are false, that the article "tended to injure" Mr. Kilgour. "Any publication which tends to injure one's reputation, and expose him to hatred or contempt, if made without lawful excuse, is libelous." *Negley v. Farrow*, 60 Md. 175.

It is a familiar principle that words not actionable without proof of special damage may become so if spoken of one engaged in a particular calling or profession; the rule being that any words spoken of a person in his office, profession, etc., which tend to expose him to the hazard of losing his office, or which charge him with incapacity, and thereby tend to injure him in his profession, are actionable without proof of special damage. [***3] 18 Am. & Eng. Ency. of Law (2nd ed.) 942.

Ashley M. Gould, for the appellee.

The article published must be taken as a whole. When so considered it does not impute to plaintiff general incapacity to perform the duties of his office. His action as narrated involves no official misconduct and no bad or corrupt motives, being the recital of baseless criticism upon the exercise of his official judgment; hence it is not libelous per se. Any caustic comments upon plaintiff's action are nullified by the full statement of the facts upon which said comments are based, and these facts demonstrate the propriety of the plaintiff's action and the lack of foundation of the criticism on it. *Sillars v. Collier*, 151 Mass. 50; *Townshend on Libel and Slander*, sec. 192; *Odgers on Libel*, 65.

From these authorities it is deducible that language touching one in his office, to be actionable per se, must either--First. Impute to him general incapacity to perform the duties of his office (and, this must be a charge of general incapacity, and not incapacity in a particular transaction); or Second. Impute to him positive past misconduct which will injuriously affect him in his office; and this imputation [***4] of misconduct must be more than mere criticism, however severe, of his official act; it must go to the extent of charging bad or corrupt motives as inspiring those acts.

This necessity that the language, to be actionable per se, must contain an imputation of bad or corrupt motive is recognized in all the cases. It is the dividing line between criticism and defamation. *Campbell v. Spootswood*, 3 Fost. & F., 421 (32 L. J. Q. B., 185); *Neeb v. Hope*, 111 Pa. St. 153; *Baldwin v. Walser*, 41 Mo. App. 243; *Robbins v. Treadway*, 2 J. J. Marshall (Ky.) 540; *Negley v. Farrow*, 60 Md. 158; *Shattuck v. Allen*, 4 Gray, 540.

A newspaper may comment on the conduct of magistrates in dismissing a case without hearing the whole of the evidence or in committing the prisoner for trial on insufficient evidence, but it must not impute that in so doing they acted deliberately and consciously from political motives. *Hibbins v. Lee*, 4 F. & F. 243.

96 Md. 16, *, 53 A. 716, **;
1902 Md. LEXIS 134, ***

Applying this test to the publication concerning plaintiff, it is respectfully submitted that no language can be found therein affecting him which, under any reasonable or natural construction of it, can be held to charge him with conduct involving base, [***5] improper, or corrupt motives. It refers to his "alleged stifling" of an inquest into the cause of death of an infant, and states that certain local officials and citizens were of the opinion that his action in so doing was an outrage. The article itself expresses no opinion upon the subject. The persons who are stated to have criticized his action do not in any way suggest, directly or indirectly, that his motive in so doing was improper or corrupt. There is no epithet applied to his act which, by any fair construction, can be considered libelous per se. The word "stifle" has no sinister or base meaning.

Moreover, even if single words or isolated sentences in the article could be distorted into a charge of personal corruption or misconduct on the part of plaintiff, the article taken as a whole fully explains and qualifies such expressions so as to exonerate plaintiff from any suspicion of misconduct, and it is thoroughly established in the law of defamation that "however positive may be the charge, if it is accompanied with words which qualify the meaning and show to the bystanders that the act imputed is not criminal, this is no slander, since the charge, taken together, does[***6] not convey to the minds of those who hear it an imputation of criminal conduct. Thus, it would not be slanderous per se to say: 'He is a thief; he has stolen my land;' and not being the subject of larceny, and one part of the charge being relieved of its criminal character by the other." Cooley on Torts, 199.

The same rule applies in cases of libel. Gaither v. The Advertising Co., 102 Ala. 458; Donahue v. Gaffey, 53 Conn. 43; Perry v. Marr, 1 R. I. 263; Hollenbech v. Hall, 103 Iowa, 214. In Gaither v. The Advertising Co., supra, the language and innuendo are as follows: "Moreover, I have ascertained from the very best authority that Mr. Gaither (meaning the plaintiff) was 'fired' (meaning thereby that the plaintiff was discharged) from the office of general manager, because of a heavy loss in the business of the office (meaning thereby that plaintiff was guilty of embezzlement as general manager of said Farmers' Alliance Exchange of Alabama)."

Inasmuch as plaintiff's conduct, which forms the basis of the criticism, was beyond the scope of his duties as State's Attorney, the alleged libel does not touch him in his office, and therefore he cannot recover.

The charge against[***7] plaintiff in the publication in question is that he stifled an inquest into the cause of the death of the child by refusing to "recommend the payment of any expenses incurred in making the inquiry." This appears in several parts of the article and is unquestionably the only act of plaintiff of which criticism by the white and colored residents and local officials of the community is predicated. This is the only thing in the article which can possibly be construed as a charge against him or as a criticism of him. It is now contended on behalf of appellee that even if the language criticizing this action of plaintiff could be held to be libelous per se, yet, inasmuch as it is no part of the legal duties of a State's Attorney in Maryland to recommend the payment of the expenses of an autopsy or inquest, the alleged libelous publication does not touch him in his office, and that therefore the declaration is obnoxious to a demurrer; for, as heretofore stated, damages are claimed only for injury to him in his official capacity.

There is no provision of law in this State which makes it the duty of a State's Attorney, or which gives him the power or authority, to interfere in any way [***8] with a coroner's inquest; nor is there any requirement of law that he shall recommend the expenses incurred by a coroner, or by a Justice of the Peace acting as coroner, in holding an inquest.

On the other hand, the coroner, or Justice of the Peace acting as coroner, is probably the most absolute and independent official known to the law. By statute in this State he may employ a physician to make an examination of a deceased person, fine him if he refuses to attend and make the examination, and charge the expenses to the county. Code, Art. 22, secs. 4, 5 and 6. He may lawfully order a post-mortem examination without the consent of the family of the deceased where death has followed an injury which seems to him insufficient alone to produce death. Young v. College of Physicians and Surgeons of Baltimore City, 81 Md. 358. He may hold an inquest and issue a commitment on Sunday. Blaney v. State, 74 Md. 153. He may conduct an inquest in the absence of the accused, and the latter is not entitled to be represented by counsel. People v. Collins, 20 How. Pr. 111; Cox v. Coleridge, 1 B. & C. 37 (8 E. C. L. 17). Even in the absence of statute, he has power to order a post-mortem in taking [***9] an inquisition of death, and for that purpose to employ an expert physician and charge the expense thereof to the proper county or municipal authority. Note to Young v. College of Physicians and Surgeons of Baltimore City, supra, reported in 31 L.R.A. 540.

96 Md. 16, *, 53 A. 716, **;
1902 Md. LEXIS 134, ***

There can be no question that the appearance of a prosecuting attorney at an inquest and his participation in the proceedings are purely matters of discretion on the part of the coroner. As said by the Court in *Blaney v. State*, supra, "an inquest held by a coroner's jury, and the commitment by a coroner or magistrate of an accused to jail, are rather ministerial than judicial acts."

If these propositions are correct, then plaintiff's action in refusing to recommend payment of the expenses of an inquest was outside the scope of his official duties, and criticism of him in reference thereto is not actionable. *Oram v. Franklin*, 5 Blackford, (Ind.) 42; *Van Tassel v. Capron*, 1 Denio, 250; *Kinney v. Nash*, 3 N. Y. 177; *Baldwin v. Walser*, 41 Mo. App. 243; *Doyley v. Roberts*, 3 Bing., N. C. 384 (32 E. C. L.); *Ayre v. Craven*, 2 Adolph & Ellis, 2 (29 E. C. L. 23).

Statements regarding plaintiff in the publication merely charge[***10] him with error of judgment in a single transaction, not amounting to a general unfitness to perform the duties of his office, and hence are not actionable.

Stating the proposition in another way, it is confidently asserted that no case can be found in which any Court has held to be actionable a criticism of a single act of a man in his official capacity, not attacking his character generally, no special damage being alleged, and the charge not imputing crime or such gross misconduct as would necessarily amount to a charge of general incapacity and unfitness for office. *Mattice v. Wilcox*, 147 N. Y. 624; *Foot v. Brown*, 8 Johns, 64; *Camp v. Martin*, 23 Conn. 94; *Manire v. Hubbard et al.* (Mch. 15, 1901), Ky., 61 S. W. 466; *Gunning v. Appleton*, 58 How. Pr. 471; *Poe v. Doctor Mondford*, 2 Croke's Rep. 620.

JUDGES: The cause was argued before FOWLER, BRISCOE, PAGE, BOYD, PEARCE, SCHMUCKER and JONES, JJ.)

OPINIONBY: PAGE

OPINION: [*23] [**717] PAGE, J., delivered the opinion of the Court.

This is an action for libel. The defendant interposed a demurrer which the Court sustained. The judgment being for the defendant, the plaintiff appealed.

The declaration contains three counts--the first and[***11] third set out parts of the alleged libelous publication, with certain innuendoes; the second contains the entire article, but without colloquium or innuendo. No special damages have been pleaded; and therefore the only question presented by the record, is, whether the publication is libelous per se. Whether this be so or not, is always on demurrer within the province of the Court; and it is also "matter of law" whether an innuendo is fairly warranted by the language declared on. *Lewis v. Daily News Co.*, 81 Md. 466; *Avirett v. State*, 76 Md. 510; *Haines v. Campbell*, 74 Md. 158; *Negley v. Farrow*, 60 Md. 158.

The declaration charges that at the time of the publication the appellant was and still is a practicing attorney and the State's Attorney of Montgomery County, and that the publication was "of and concerning him in respect of his said profession as a practicing attorney and of his duties as State's Attorney." It is not contended that the words of the publication are libelous as against the appellant, otherwise than as they touch upon or have reference to his profession and his official position[***12] of State's Attorney. The rule of law applicable to a case of that kind, seems to be clear. "Words spoken [*24] of a person in his office, trade, profession, business or means of getting a livelihood, which tend to expose him to the hazard of losing his office, or which charge him with fraud, indirect dealings or incapacity and thereby tend to injure him in his trade, profession or business, are actionable without proof of special damage, even though such words if spoken or written of an ordinary person, might not be actionable per se." 18 Am. & Eng. Ency. of Law, p. 942 (2nd ed.); *Wilson v. Cotterman*, 65 Md. 190.

"The words must go so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it." *Sillars v. Collier*, 151 Mass. 50; *Newell on Defamation, Slander and Libel*, ch. 8, p. 178; *Townsend, Libel and Slander*, secs. 188, 189.

So this Court said in *Newbold & Sons v. The J. M. Bradstreet & Son*, 57 Md. 38: "To say or publish of a merchant anything that imputes insolvency, inability to pay his debts, [***13] the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, is slanderous or libelous per se if without justification."

96 Md. 16, *, 53 A. 716, **;
1902 Md. LEXIS 134, ***

In *Richardson v. State*, 66 Md. 205, the Court citing from *Woodgate v. Ridout*, 4 Foster & Finlason, 223, said: "It is of essential importance the administration of justice should be open to discussion; but that criticism must be fair and honest and not reckless and uncharitable; and that anything beyond this, and which imputes corrupt motives to those who administer it, is an abuse of privilege." "If one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives he must do so at his peril, and must either prove the truth of what he says or answer in damages to the party injured." *Negley v. Farrow*, 60 Md. 158.

These principles, which are fully supported by authority, establish the proposition, that, in order to find the words of this publication libelous, we must be enabled to determine that they impute to the appellant as an attorney and State's Attorney, [*25] some base or corrupt motive, or incapacity, [***14] in the discharge of the duties of such office; or, as stated by Newell, some "unfitness to perform" the duties of the office, or "want of integrity in the discharge of them." *Newell on Slander and Libel*, ch. 8; *Neeb v. Hope*, 111 Pa. 145, 153-154; *Baldwin v. Walser*, 41 Mo. App. 243-254.

The publication was published in the "Evening Star," a newspaper printed in the city of Washington, and circulated in Montgomery County. Apparently, it is an ordinary news item, containing a statement of the circumstances attending the death and burial of a negro baby, of the suspicions concerning it that were aroused in the community where the events took place, and of the actions of the State's Attorney in connection therewith. It is not requisite that the whole article be reproduced here. It is long, and it will answer every purpose, if we state its general purport and then refer more particularly to those parts that are relied on by the appellant to show the libelous character of the publication. As set out in the second count of the declaration, the article states, that one Bessie Sellman had given birth to a child, no physician being present;--that[***15] the mid-wife, who officiated, told the reporter that it was healthy and that after seeing it some half-dozen times at intervals of probably a week, she predicted it would "grow up;" that on May 3rd, 'she was horrified to be told that a notice was tacked on a tree' to the effect that the baby was dead and that Henry Mason had buried it in Steven's lot." Some conversation between this woman and Henry Mason is then recited. The article then proceeds (in substance) to state, that the actions and language used by Mason led the reporter to watch near Mason's house, and he saw Mason's father-in-law come out of Mason's house with a spade and "go to the place said to be a grave" and dig up a box shaped like a coffin, which he carried [**718] away and buried (as the reporter afterwards learned) in Mason's yard. That he then reported the matter to the Justice of the Peace who consulted the appellant; that the latter told him to "issue warrants for the arrest of everybody suspected of having anything to do with the affair and commit them to the Rockville jail." The justice however issued a warrant only for the arrest of the mother who was committed to jail for a hearing. That the remains of [***16] the baby were disinterred "with the idea that an autopsy was to be made" and in compliance with his request the State's Attorney was notified. "The latter Mr. Thompson said, reached Gaithersburg about the hour appointed for the inquest to begin, and almost at once, supposedly by appointment met Dr. McCormick, who saw the baby soon after its death. A conversation between the doctor and the State's Attorney followed and at its termination, Mr. Kilgour informed Deputy Sheriff Thompson and Justice Baughman, that if an autopsy was held he would refuse to recommend the payment of the bill for the expenses, with the result stated. The State's Attorney went back to Rockville soon afterwards, and ordered the immediate release of Bessie Sellman from jail, which order was obeyed." That the body was reinterred. It is then stated that this action of the State's Attorney produced mingled feelings of indignation and resentment on the part of white and colored residents; also what Mr. Thompson had to say about it, to the effect, that "he denounced it as an outrage on Kilgour's part;" had it been a white man who was charged, &c., he would in all probability have been strung up to one of the [***17] trees, &c., and that he intended "to leave no stone unturned to sift the whole affair;" and further that the Justice of the Peace expressed "similar views," &c.

We do not find in this long publication, a fair outline of which we have given, any imputation whatever upon the motives or capacity of the State's Attorney. There is apparent a strong feeling on the part of Thompson, that there should have been a fuller investigation; though it does not appear he knew what it was, that had been communicated to the State's Attorney by Dr. McCormick. The article states that he, Thompson, denounced the transaction as an "outrage" on Kilgour's part. But the word "outrage" was used immediately succeeding the statement of what Mr. Kilgour's [*27] part really was; and if that statement does not impute corrupt motives to him, Mr. Thompson's harsh word is of no avail. The charge, that he had committed an outrage, would not then be slanderous, because of the fact, that it is accompanied with words that qualify the meaning, that might otherwise be attached, to it, and show that the act imputed, was not in fact an outrage, nor one that reflected adversely upon the character or motives of the [***18] officer.

96 Md. 16, *; 53 A. 716, **;
1902 Md. LEXIS 134, ***

In the opening sentences of the publication, it is stated that many prominent citizens were greatly agitated, "on account of the alleged stifling by the State's Attorney of an investigation of the mysterious death, &c.," and it is insisted that the word "stifling" was used in its offensive sense, and implied that the State's Attorney acted from corrupt motives. But we cannot accept this view if the whole article be considered, as must be done if we are to arrive at the true meaning and force of particular words or phrases. It is not proper to separate words or phrases from the context. All parts of the paper should be read in connection, to collect their true meaning. *Gaither v. The Advertising Co.*, 102 Ala. 458; *Donaghue v. Gaffy*, 53 Conn. 43; *Am. & Eng. Ency. of Law*, 2nd ed., vol. 18.

Now almost in the same connection in which the words "alleged stifling" occur, we are told how the stifling was accomplished, viz. the State's Attorney "announced he would not recommend the payment of any expenses incurred in making the inquiry." And later on it is stated, that he made this announcement at the termination of a conversation[***19] between the State's Attorney and Dr. McCormick "who saw the baby soon after its death." So that the charge of "stifling" as explained in the article, means nothing more, than that the State's Attorney after he had had a consultation with the physician who had seen the baby soon after its death, announced he would not recommend the payment of the expenses if the inquest was held. There is no imputation here that the State's Attorney was actuated by corrupt motives; on the contrary it would seem to be a reasonable inference [*28] from the statement, that after the consultation with the physician, he deemed an inquest unnecessary, and therefore would decline to recommend the payment of the expenses.

Another statement in the article, which is relied on by the appellant to show its libelous character, is, that in which the State's Attorney is "reported to have said; I want you, as soon as you go back, to issue warrants for the arrest of everybody who is suspected of having anything to do with this affair and commit them to the Rockville jail." But we cannot think this imputes anything to the detriment of the official character of the appellant. If there were reasonable grounds of[***20] suspicion against persons, it was highly proper that they should be brought before the magistrate, and their supposed crime investigated. It certainly could not detract from the official reputation of the State's Attorney, that he desired that all suspected persons should be secured and retained until their probable complicity with the crime could be examined into. It was not a "wholesale arrest of citizens" that he advised, but such as were only suspected of having anything to do with the crime. If there were any properly suspected, they should have been arrested.

But without prolonging this opinion with a further discussion of the article, we may say, that after a careful examination of its[*719] statement, we are of opinion that it is not libelous either in its entirety or any of its parts.

Aside from all we have said, so far, there is another matter that forces itself on our attention. Whatever may be held as to the character of the publication, can any of its statements touch the appellant as State's Attorney? The narr. charges that they were printed and published of and concerning him in respect of his profession "as a practicing attorney and of his duties as State's [***21] Attorney." If the appellant in his actions before the Justice of the Peace, was not within the authority of the office of State's Attorney, he must be viewed as a private person only, and a charge that he was then actuated by corrupt motives would only touch him personally, and the words could not in such case be actionable per se on the theory [*29] that it touched him in his office. In *Ayre v. Craven*, 2 Adolp & El. 2, it was held that the scandalous conduct imputed to the plaintiff in his profession must "be connected by the speaker with that profession." Words not per se actionable, will not be ground for an action "though spoken of one who holds an office * * unless they are spoken of and touch him in his office." *VanTassel v. Capron*, 1 Denio 252. And in *Baldwin v. Walser*, 41 Mo. App. 243, it was said the language "must touch him" in that special character or relation * * It is not sufficient that the language disparages him generally, or that his general reputation is thereby affected, it must be such as, if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character[***22] assumed." *Townsend on Slander and Libel*, sec. 190. See 18 *Am. & Eng. Ency. of Law* (2 ed.) p. 945, where many authorities are collected.

The specific charge in the article is that the appellant announced to the justice that he would refuse to recommend the payment of the expenses of the inquest, and thereby "stifled" the investigation. It is impossible for us to find any theory upon which it can be held that in making such announcement, the appellant was acting within the scope of his official duties as a State's Attorney. The duties of the State's Attorney are such only, as are prescribed by our Constitution and the statutes of the State. He possesses no "power by the common law of England for they are unknown to it; nor by the common law of this State, for both they and the power claimed for them are unknown to it." *Hawkins v. The State*, 81 Md. 306. His duty as prescribed by statute, is to prosecute and defend on the part of the State, in all cases in which the State may be interested: Code, Art. 10, sec. 17. There is no case before the officer holding an inquest in which there is

96 Md. 16, *, 53 A. 716, **;
1902 Md. LEXIS 134, ***

prosecution to be done on the part of the State; and even if there was, [***23] the duty (if it be conceded there was such), to prosecute would not carry with it the obligation on the part of the State's Attorney, to make recommendations as to the payment of the expenses. It should be borne in mind in this connection that [*30] the charge is not that the appellant committed some wrong while prosecuting or defending for the State before the justice, or omitted to do something he ought as a faithful officer to have done; but only that he "announced" he would not recommend, (to some one, whose name is not given), the payment, &c. This certainly was not within his duties as State's Attorney, and any criticism directed towards him for making such an announcement, affects him only as a private person. As such he had power to make recommendations, but he had no such authority or obligation as a State's Attorney, who has nothing to do, officially, with the expenses of a coroner holding an inquest. If we are correct in this, it would follow, if there were no other reason therefor, that the demurrer to this count was properly sustained.

It is attempted, in the first count, to impute to the words of part of the article, a libelous signification, by means of an innuendo.[***24] The alleged libel is set out in this count in the following words; viz. "Probing the mystery. Death of a child at Emory Grove excites suspicion. Infanticide openly charged. Action of the State's Attorney strongly criticised. Citizens are aroused. Many of the most prominent residents of Gaithersburg, Maryland, and nearly the entire population of Emory Grove, a hamlet about a mile from that town are greatly agitated on account of the alleged stifling by the State's Attorney Kilgour (meaning the plaintiff), of an investigation of the mysterious death May 1st, or the night previous of a two-months-old child at Emory Grove. The investigation was started by Justice of the Peace Baughman, and Deputy Sheriff Horton Thompson, and promised, so those officials told a 'Star' reporter to clear up all doubts in the case. The State's Attorney (meaning the plaintiff), appeared at the preliminary hearing before Justice Baughman, however, and announced that he would not recommend the payment of any expenses incurred in making an inquest and that the proceedings were a little later brought to a close. (Meaning thereby that the plaintiff wantonly, wilfully, corruptly, and by malfeasance in the discharge[***25] of his official duties as State's Attorney, [*31] aforesaid, stifled and prevented all proper inquiry as to the cause of the death of a two-months-old child at Emory Grove, aforesaid, and thereby perverted the ends of justice)."

There is no colloquium to support the innuendo; and in such case the rule is, that the innuendo "can never be taken to expand or enlarge the meaning of the words used, and give to them a particular meaning different from that in which they would be ordinarily understood in their more innocent signification." *Peterson v. Sentman*, 37 Md. 140; *Barnes v. State*, 88 Md. 347.

As has been shown there is nothing in the publication that imputes corrupt motives to the appellant, or[**720] that he prevented any inquiry into the death of the child, or that he did anything "by malfeasance in the discharge of his official duties." What it is stated he did, was, merely, that he made an announcement. If the inquest was thereby ended, it was by the act of the Justice of the Peace, for which the State's Attorney was not responsible, either personally or as State's Attorney. It seems to us very clear, therefore that when[***26] it is claimed that the words of the publication mean or may be taken to mean that the appellant, as a public officer, acted "wantonly, wilfully, corruptly and by malfeasance and thereby prevented" the inquiry and "perverted the ends of justice," there is an enlargement of the meaning of the words actually used, far beyond what they will bear. For this reason the count is bad.

We refrain from discussing the sufficiency of the third count, after all that has been already said. We are of the opinion that the innuendo therein set forth, is not warranted by the words of the publication. There is nothing in the publication that by any reasonable interpretation, unaided by colloquium or inducement, can be taken to mean that the State's Attorney "had all sufficient evidence" to have required the State's Attorney "to have caused a full investigation of a heinous crime" or that he declined to do so because the baby and Mason were negroes. The count was therefore bad.

Finding no error in the ruling of the Court, the judgment will be affirmed.

Judgment affirmed.

LARRY KLAYMAN, APPELLANT, v. DAVID SEGAL, et al., APPELLEES.
No. 00-CV-896

DISTRICT OF COLUMBIA COURT OF APPEALS

783 A.2d 607; 2001 D.C. App. LEXIS 225

April 12, 2001, Argued
October 18, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the District of Columbia. (Hon. Judith Bartnoff, Trial Judge).

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of the District of Columbia entered a judgment dismissing appellant individual's amended complaint alleging defamation and false light invasion of privacy against appellees, columnist and newspaper. The amended complaint was dismissed pursuant to D.C. Super. Ct. R. Civ. P. 12(b)(6) (2000), for failure to state a claim upon which relief could be granted. The individual filed an appeal.

OVERVIEW: On appeal, the individual contended that a statement in an article published in the newspaper and written by the columnist: (1) was reasonably capable of being understood in a defamatory sense because it falsely caused him to appear so bent on publicity for himself that he was insensitive to the murder of innocent children; and (2) placed him in a false light that would be offensive to any reasonable person. The appellate court held that, when read in context, a reasonable person of ordinary intelligence would not understand the fair and natural meaning of the statement in question to be that the individual was insensitive to the murder of innocent children. Therefore, the appellate court concluded that the words were not reasonably capable of a defamatory meaning as a matter of law, since they did not make the individual appear odious, infamous, and ridiculous. Similar to its conclusion that the challenged statement did not make the individual appear to be odious, infamous, and ridiculous, and for the same reasons, the appellate court held that the statement did not place the individual in a highly offensive false light.

OUTCOME: The judgment was affirmed.

CORE TERMS: defamatory meaning, false light, talk, defamatory, shooting, television, offensive, he'd, innocent, odious, sentence, reasonable person, ridiculous, murder, infamous, matter of law, appearance, producer, defamation, natural meaning, public interest, publicity, ethics, defamation action, public relations, law firm, insensitive, pro-life, assaulting, actionable

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action
Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN1] An appellate court reviews a D.C. Super. Ct. R. Civ. P. 12(b)(6) (2000) matter de novo because it is a question of law. An appellate court dismisses a complaint for failure to state a claim for which relief can be granted only if it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff and, if these allegations are sufficient, the case must not be dismissed even if the appellate court doubts that the plaintiff will ultimately prevail.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] An appellate court will not dismiss a complaint under D.C. Super. Ct. R. Civ. P. 12(b)(6) (2000) which alleges defamation if the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning. A statement is defamatory if it tends to injure the plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community. In addition, a plaintiff must establish the falsity of the statement by a preponderance of the evidence.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN3] A plaintiff bringing a defamation action must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN4] An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiffs appear odious, infamous, or ridiculous. If it appears that the statements are at least capable of a defamatory meaning, whether they were defamatory and false are questions of fact to be resolved by the jury.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN5] The court determines: (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory. The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN6] The plaintiff has the burden of proving the defamatory nature of a challenged publication, and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed. However, when presented with a D.C. Super. Ct. R. Civ. P. 12(b)(6) (2000) motion to dismiss a defamation action, the trial court must assume, as the complaint alleges, the falsity of any express or implied factual statements made in the article at issue, and it must also assume that such statements were made by the appellees with knowledge of their falsity or reckless disregard for their truth.

Torts: Defamation & Invasion of Privacy: False Light Privacy

[HN7] An invasion of privacy-false light claim requires a showing of: (1) publicity; (2) about a false statement, representation, or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be highly offensive to a reasonable person. Thus, before finding that a statement is not actionable, because it is not reasonably capable of a defamatory meaning, the trial court must also satisfy itself that the statement does not arguably place the plaintiff in a highly offensive false light.

Torts: Defamation & Invasion of Privacy: False Light Privacy

[HN8] One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] The legal principle that a publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed, embodies certain critical legal concepts: (1) context, (2) plain or fair and natural meaning of the words used, and (3) average or common mind or ordinary and common acceptance. "Context" is a critical legal concept for determining whether, as a matter of law, a statement is reasonably capable or susceptible of a defamatory meaning. "Context" serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article. As the Supreme Judicial Court of Massachusetts has stated, the

concept of context requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN10] In a defamation action, the statements at issue should not be interpreted by extremes, but should be construed as the average or common mind would naturally understand them. While every fair inference in a pleading may be used to determine whether the words complained of are capable of a meaning ascribed by innuendo, inferences cannot extend the statements, by innuendo, beyond what would be the ordinary and common acceptance of the statement.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] Perceived unpleasantness and offensiveness are not sufficient to sustain an allegation that material is reasonably capable of a defamatory meaning.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN12] For purposes of a defamation action, the average or common mind would naturally understand "odious" to mean arousing or deserving hatred or loathing; "infamous" as notorious or in disgrace or dishonor; and "ridiculous" as absurd or deserving ridicule, that is, the act of making someone or something the object of scornful laughter by joking, mocking, etc.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN13] A plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.

Evidence: Writings & Real Evidence: Demonstrative Evidence

[HN14] It is well-settled that the results of lie detector tests are inadmissible in the District of Columbia.

COUNSEL: Larry Klayman, Pro se.

Kevin T. Baine, with whom Margaret A. Keeley was on the brief, for appellees.

JUDGES: Before STEADMAN, SCHWELB and REID, Associate Judges.

OPINIONBY: REID

OPINION: [*609]

REID, Associate Judge: Appellant Larry Klayman challenges the trial court's dismissal, under Fed. Civ. R. 12 (b)(6) (2000)(failure to state a claim upon which relief may be granted), of his amended complaint alleging defamation and false light invasion of privacy against appellees (David Segal and The Washington Post). He filed a timely notice of appeal, contending that, contrary to the trial court's conclusion, a statement n1 in an October 25, 1999, article published in The Washington Post and written by Mr. Segal: (a) "is reasonably capable of being understood in a defamatory sense" because it "falsely caused [him] to appear so bent[**2] on publicity for himself that he is insensitive to the murder of innocent children. . . ."; and (b) places him in a false light that would be "offensive to any reasonable person." We hold, although it is a fairly close call, that when read in context, a reasonable person of ordinary intelligence would not understand the fair and natural meaning of the statement in question to be that Mr. Klayman is insensitive to the murder of innocent children. Thus, as a matter of law, the statement is neither reasonably capable of defamatory meaning, nor does it place Mr. Klayman in a highly offensive light.

-----Footnotes-----

n1 The statement in question reads: "If there was a school shooting, he'd say, 'So what? We're doing important things here.'"

-----End Footnotes-----

FACTUAL SUMMARY

Mr. Klayman, self-described as "the founder and General Counsel of a conservative pro-life ethics organization and public interest law firm, Judicial Watch, Inc.," n2 was the subject of a series of articles appearing in The Washington Post, entitled "Klayman's Chronicles. [*3] " n3 In his amended complaint against Mr. Segal and The Washington Post, he alleged that the articles were "intended to ridicule, embarrass and defame [him] and hold [him] in a false light." In particular, he complained about an article appearing under Mr. Segal's byline on October 25, 1999, in the business section of the newspaper. The article, "Guess Who's on the Line," reads in full:

Ever wonder how Larry Klayman ends up on so many television talk shows? No question, he's a spigot of [*610] political opinions, and as chairman of Judicial Watch - - a nonprofit that has sued the Clinton administration more than a dozen times - - he knows how to fulminate about the commander in chief. Sometimes Klayman even brings his own videotape, lifted from recent depositions in his office. To producers, he's like a dinner guest who brings the meal, then cooks it.

But there's more in Klayman's television omnipresence than good soundbites. He's also a master, it turns out, at old-fashioned badgering. According to a former employee, Klayman demanded that his public relations person call a handful of talk show producers every single day, rain or shine, regardless of the day's news.

"He would come[**4] in each morning and ask, 'Who have you called and why haven't you called?'" said the one[-]time employee, who requested anonymity. "If the show was doing Hollywood that night, he'd say call anyway. If they were doing Tiananmen Square he'd say, 'Well, I'm an international lawyer, try to pitch that.' If there was a school shooting he'd say, 'So what? We're doing important things here.'"

The nonstop barrage can get a little wearying for producers. "In his world, he wants the Klayman News Network," said one producer at a 24-hour news network. "His people call a few times a day. He wants to be on at 1 o'clock, 2 o'clock and 3 o'clock."

For anyone who can't wait for the next Klayman cameo, there's a growing line of Judicial Watch apparel, now for sale on the organization's web site. Products include the "JW Pinstripe Henley," a shirt that features a "100 percent cotton pinstripe body with contrast color collarette, placket and sleeves dyed to match buttons. White/Navy Sizes M-2XL, \$30.00[.]" There are also a JW "swat team" style windbreaker, poplin jacket, pique polo shirt; a couple of JW watches, and a mug and a paperweight.

During the hearing on the motion to dismiss his[**5] amended complaint, the trial judge asked Mr. Klayman to identify the section of the article that he contended was defamatory. He responded, in part:

An article must be read in total context. . . . But the specific statement that pushes this thing over the top into the area of being defamatory is "if there was a school shooting he'd say[,] 'So what[?] We're doing important things here[.] . . .'" That statement is totally one hundred percent false. I even submitted to a polygraph examination to show Your Honor that. . . . Larry Klayman and Judicial Watch are a public interest law firm that believes in ethics, Judeo Christian ethics, family values. . . . This was a series called the Klayman Chronicles. . . . No lawyer that I know of has ever been subjected to a series which runs almost every two weeks and tries to make him ridiculous and odious and stupid in front of courts. . . . It is intended to try to make Larry Klayman look as if he's so bent on publicity he'll bring any lawsuit at any time and he doesn't even care about the death of innocent children because all he wants is publicity and to make money and to go on with his public interest law firm called Judicial[**6] Watch. That is defamatory particularly in the context that we are pro-life, we are pro-family, we represent groups such as Focus on the Family, . . . we represent the moral majority of Dr. Falwell. And it was intended to humiliate Larry Klayman, and to defame me to say I don't care about young children being killed.

[*611]

Counsel for appellees disagreed with Mr. Klayman's interpretation of the article. He stated that, read in context, the article "means that Mr. Klayman tried to get on talk shows all the time, in the words of the column, regardless of the day's news because he regards his work as important." Asked to address Mr. Klayman's pro-family argument, counsel for appellees responded, in part:

It is completely unreasonable to read this column to mean that Mr. Klayman in his heart doesn't care whether innocent children are murdered. That's not what it says. What it says is in essence that he didn't regard a school shooting as a reason to suspend his activities. He didn't think it was a reason to refrain from calling up talk shows to try to arrange appointments

I don't think it's defamatory to say of somebody that you're sensitive about something, that[**7] is not disgraceful, odious, to be a less than sensitive person. . . . The Post didn't say Mr. Klayman is insensitive. . . .

In addition to Mr. Klayman's pro-family argument, the trial judge asked counsel for appellees to focus on the "so what?" statement in the article. He replied, in part:

Again, you can't read those words alone, you must read them in connection with the rest of the column. In context they don't mean so what[,] I don't care whether anybody got murdered yesterday and it's a matter of moral indifference to me whether innocent children are slaughtered or not. It means so what does that have to do with my request to you to call up a television talk show, that is not a reason to suspend our activities today.

Later, when the trial judge expressed doubt as to where the article implied that Mr. Klayman did not "care about innocent children," Mr. Klayman retorted: "It's in the plain language of the word. If there was a school shooting he'd say 'so what.'"

-----Footnotes-----

n2 Mr. Klayman's amended complaint asserts that: "The public interest law firm . . . is dedicated to furthering honest government and respect for the law, and fighting government corruption."
[**8]

n3 Although Mr. Klayman's amended complaint refers to "numerous disparaging articles" about him in The Washington Post, particularly those published under the heading 'Klayman's Chronicles,' [which] appear approximately every two (2) weeks in the 'Washington Hearsay' page of The Washington Post's Monday Business Section, the record on appeal contains only two articles concerning Mr. Klayman, the October 25, 1999 article by Mr. Segal, and a February 14, 2000 article by James V. Grimaldi entitled, "Help Wanted," which references the approaching end of the Clinton Presidency, states that Mr. Klayman is among "those who made careers out of the Clinton administration scandals," and asks readers to "help [] find a new job for [Mr.] Klayman."

-----End Footnotes-----

The trial judge granted appellees' motion to dismiss, stating, in pertinent part:

The issue before the Court is whether - - accepting the allegations of the Complaint as true and that the school shootings statement was not made by the plaintiff - - the article is reasonably capable of a defamatory meaning, under District of Columbia law. Although Mr. [**9] Klayman argues that the statement makes him appear "insensitive to the murder of innocent children," that is clearly not the meaning of the statement in the context of the article. The article does not say, directly or by implication, that Mr. Klayman does not care about the murder of children or about school shootings (or about Hollywood or Tiananmen Square). What it conveys is that Mr. Klayman believes his work to be important and to warrant media attention and talk show appearances, on a par with other major news stories, including school shootings and notable international events. Mr. Klayman does not dispute that he considers his activities to warrant significant media attention. He makes much in his pleadings and other submissions in this case of his dedication to investigating and exposing corruption in government, and he does not deny that he has made a concerted effort to obtain media coverage for his positions and for the activities of Judicial Watch. The statement in the article is only capable of a defamatory meaning if it is taken out of context, which the law neither requires nor permits. . . .

For the [same] reasons . . . ,the Court does not find that the challenged [**10]statement, in context, reasonably can support the plaintiff's false light claim. It does not place Mr. Klayman in a false light [*612] that would be offensive to a

reasonable person to suggest that he believes his work is important enough to warrant continuing media coverage, even when other events as significant as school shootings may also be in the news.

ANALYSIS

Mr. Klayman contends that the trial court erred in concluding that The Washington Post article "does not say, directly or by implication, that Mr. Klayman does not care about the murder of children or about school shootings (or about Hollywood or Tiananmen Square)." Citing *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877 (D.C. 1998), he argues that: "Whether the statements at issue here were understood in this defamatory sense - - and [Mr. Klayman] submits that [they were] - - is a question of fact that only a jury can resolve." In addition, he challenges the trial court's conclusion concerning his invasion of privacy/false light claim, maintaining that: "Any reasonable person, much less the head of a conservative, pro-life ethics organization and public interest law firm, would[**11] be offended by the false light in which [Mr. Klayman] was placed." Appellees assert that the trial court may properly "determine[]" (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory." In addition, they contend that The Washington Post article at issue in this case "is not reasonably capable of any defamatory or highly offensive meaning," [and] "as a matter of law[,] it is not actionable and dismissal is warranted."

We [HN1] review this Rule 12 (b)(6) matter de novo because it is a question of law. See *Wallace*, supra, 715 A.2d at 877 (citing *Abdullah v. Roach*, 668 A.2d 801, 804 (D.C. 1995) (other citation omitted)); see also *Weyrich v. The New Republic, Inc.*, 344 U.S. App. D.C. 245, 251, 235 F.3d 617, 623 (2001) (citing *Taylor v. F.D.I.C.*, 328 U.S. App. D.C. 52, 60, 132 F.3d 753, 761 (D.C. Cir. 1997)). We dismiss a complaint for failure to state a claim for which relief can be granted only if "it is beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Wallace*, supra, 715 A.2d at 877 [**12] (citing *Abdullah*, supra, 668 A.2d at 804 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))). "The allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff and, if these allegations are sufficient, the case must not be dismissed even if the court doubts that the plaintiff will ultimately prevail." *Id.* (citing *Atkins v. Industrial Telecomms. Ass'n, Inc.*, 660 A.2d 885, 887 (D.C. 1995) (citations omitted)).

We [HN2] will not dismiss a complaint under Rule 12 (b)(6) which alleges defamation n4 if "the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning." 715 A.2d at 875; see also *Weyrich*, supra, 344 U.S. App. D.C. at 255, 235 F.3d at 627 ("Whether a statement is capable of defamatory [*613] meaning is a question of law, but 'it is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous.'" (quoting *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 279, 909 F.2d 512, 518 (D.C. Cir. 1990)[**13] (quoting *Levy v. American Mut. Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964))). "[A] statement is defamatory if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2001) (emphasis in original) (quoting *Howard Univ. v. Best*, 484 A.2d 958, 988 (D.C. 1984)); see also *Weyrich*, supra, 344 U.S. App. D.C. at 255, 235 F.3d at 627 (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 343-44, 838 F.2d 1287, 1293-94 (D.C. Cir. 1988) (quoting *Best*, supra, 484 A.2d at 988)). In addition, a plaintiff must establish the falsity of the statement by a preponderance of the evidence. *Moldea v. New York Times Co.*, 304 U.S. App. D.C. 406, 411, 15 F.3d 1137, 1142 (1994) (*Moldea I*) (citation omitted), modified, 306 U.S. App. D.C. 1, 22 F.3d 310 (1994) (*Moldea II*), cert. denied, 513 U.S. 875, 130 L. Ed. 2d 133, 115 S. Ct. 202 (1994). n5

-----Footnotes-----

n4 [HN3] "A plaintiff bringing a defamation action . . . must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Beeton v. District of Columbia*, 779 A.2d 918 (citing *Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n.2 (D.C. 1997) (quoting *Prins v. International Tel. and Tel. Corp.*, 757 F. Supp. 87, 90 (D.D.C. 1991) (internal quotations omitted))).

[**14]

n5 Because prolonged litigation in defamation actions against media defendants may inhibit free speech, summary judgment is a useful method of disposing of such actions where the requirements of Rule 56 are satisfied. See *Guilford Transp. Indus.*, supra, 760 A.2d at 592 (citations omitted). Indeed, in the First Amendment area, summary procedures are essential. *Id.*

-----End Footnotes-----

[HN4] "An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiffs appear 'odious, infamous, or ridiculous.'" *Best*, supra, 484 A.2d at 989 (quoting *Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 697 (D.C. 1970)). "If it appears that the statements are at least capable of a defamatory meaning, whether they were defamatory and false are questions of fact to be resolved by the jury." n6 *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990) (citing *Olinger v. American Sav. & Loan Ass'n*, 133 U.S. App. D.C. 107, 109, 409 F.2d 142, 144 (1969) (per curiam)).

-----Footnotes-----

n6 See 3 RESTATEMENT SECOND, TORTS, § 614:

(1) [HN5] The court determines

(a) whether communication is capable of bearing particular meaning, and

(b) whether that meaning is defamatory.

(2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

-----End Footnotes-----

[**15] [HN6]

"The plaintiff has the burden of proving the defamatory nature of [a challenged] publication (citation omitted), and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." *Best*, supra, 484 A.2d at 989 (citing *Afro-American Publ'g Co. v. Jaffe*, 125 U.S. App. D.C. 70, 76, 366 F.2d 649, 655 (1966) (en banc)) (internal citation omitted). However, when presented with a Rule 12 (b)(6) motion to dismiss a defamation action, "we must assume, as the complaint alleges, the falsity of any express or implied factual statements made in the article" at issue, *Weyrich*, 344 U.S. App. D.C. at 251, 235 F.3d at 623, and "we must also assume that such statements were made by appellees with knowledge of their falsity or reckless disregard for their truth." *Id.* (citation omitted).

[HN7] "An invasion of privacy - false light claim requires a showing of: 1) publicity 2) about a false statement, representation or imputation 3) understood to be of and concerning the plaintiff, and 4) which places the plaintiff in a false light that [*614] would be [highly] offensive to a reasonable person. [**16]" *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999) (referencing RESTATEMENT (SECOND) OF TORTS § 652E (1977)); n7 see also *Vassiliades v. Garfinckel's*, 492 A.2d 580, 587 (D.C. 1985). Thus, "before finding that a statement is not actionable, because it is not reasonably capable of defamatory meaning, [the trial court] must also satisfy itself that the statement does not arguably place appellant in a 'highly offensive' false light." *Weyrich*, supra, 344 U.S. App. D.C. at 256, 235 F.3d at 628.

-----Footnotes-----

n7 Section 652E states:

[HN8]

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

-----End Footnotes-----

[**17]

In order to determine whether the challenged article about Mr. Klayman, which appeared in The Washington Post, is capable of defamatory meaning, we focus now on the legal principle that, "the publication must be considered as a whole, in the sense it would be understood by the readers to whom it was addressed." Best, supra, 484 A.2d at 989 (citation omitted). [HN9] This legal principle embodies certain critical legal concepts: (1) context, (2) plain or fair and natural meaning of the words used, and (3) average or common mind or ordinary and common acceptance. "Context" is a critical legal concept for determining whether, as a matter of law, a statement is reasonably capable or susceptible of a defamatory meaning. See *Moldea II*, supra, 306 U.S. App. D.C. at 4-6, 22 F.3d at 313-15; RESTATEMENT OF TORTS (SECOND), § 563, comment e. "Context" serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article. As the Supreme Judicial Court of Massachusetts has stated, the [**18]concept of context "requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence." *Foley v. Lowell Sun Publ'g Co.*, 404 Mass. 9, 533 N.E.2d 196, 197 (Mass. 1989) (citations omitted).

Context was important in reaching our decision in *Wallace*, supra, which in part concerned a defamation action by a terminated attorney against her former law firm. There, the appellant identified certain statements as capable of a defamatory meaning, including the following: "The plaintiff was frequently out of the office during office hours." 715 A.2d at 877. We emphasized that: "An allegation that an attorney is often out of the office during normal working hours, although perhaps inconclusive on its face, could reasonably be construed, in context, as a reflection on her professional performance." 715 A.2d at 878 (footnote omitted).

Similarly, context was significant in *Foley*, supra. There, the subject was an eight-sentence article which appeared in a Lowell, Massachusetts newspaper. The headline read: "Police log [-] Officer assaulted; [**19] two men charged," and the first sentence of the article stated: "Two Lowell men who claimed their store had been robbed were arrested this morning after assaulting a police officer when he arrived on the scene." 533 N.E. 2d at 199. Appellant sued [**615]the newspaper, alleging defamation. The court declared:

After examining the complained-of statement in the context of the entire article - - which included both the feature heading "Police log," and the headline which clearly indicates that the two men were charged with assaulting an officer, as well as five statements of attribution of facts to the police within the eight sentences devoted to the incident involving [appellant] - - we decide that a reasonable reader could not conclude that the Sun was accusing [the appellant] of assaulting the officer. When the statement is read in the context of the article as a whole, its clear meaning is to report that [the appellant] was arrested for assaulting an officer - - and not that he either had been convicted of the offense or had actually committed the assault.

533 N.E.2d. at 197 (citations omitted).

Weyrich, supra, is also instructive regarding the concept of "context." [**20]344 U.S. App. D.C. at 248, 235 F.2d at 620. There, the District of Columbia Circuit considered both the political and behavioral context of an article about Mr. Weyrich to determine whether it was reasonably capable of "attributing to [him] a diagnosable mental illness[,] paranoia" *Weyrich*, 344 U.S. App. D.C. at 248, 235 F.2d at 620. Following its examination of the full article, the court said, in part:

Admittedly, the article paints an unflattering picture of appellant. Indeed, it uses examples of his "famous temper" to shade the line between political extremism and personal extremism, suggesting that the alleged irrationality of the

conservative right runs deeper than mere ideology. But the article's suggestion that appellant's behavior exhibited "paranoia" is rhetorical sophistry, not a verifiable false attribution in fact of a "debilitating mental condition". . . . Never does the article claim to make a psychological pronouncement, nor would a reasonable reader understand it to do so. . . . Presented in such a loose manner, in such a well-understood context, the article's reference to "bouts of . . . paranoia" is neither[**21] verifiable nor does it imply specific defamatory facts about appellant.

Weyrich, 344 U.S. App. D.C. at 253, 235 F.3d at 625 (citations omitted) (emphasis in original). Nonetheless, the court went on to examine other portions of the article, in context, and concluded that a remand for further proceedings was necessary because: "If indeed the story is fabricated, we cannot say that it is not reasonably capable of any defamatory meaning - - it arguably makes appellant appear highly volatile, irrational, unsound and otherwise 'odious, infamous, or ridiculous.'" 344 U.S. App. D.C. at 255, 235 F.3d at 627.

At issue in *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1050 (Pa. 1995) was an article in the *Philadelphia Inquirer* about an incident that took place on the campus of an historically black educational institution, Lincoln University, between non-students and students. The article stated in part:

Writing to a local newspaper, [University President] Sudarkasa questioned remarks by the Chester County district attorney that one of the New Yorkers had been stabbed. When D.A. James MacElree replied with quotations from police reports, the university's[**22] lawyer, Richard Glanton, accused him of electioneering - - "the David Duke of Chester County running for office by attacking Lincoln."

674 A.2d at 1052 (alteration in the original). Mr. MacElree, who later became a judge, sued the owner of the *Philadelphia Inquirer*, alleging defamation because "the David Duke" remark was not made by Mr. Glanton, [*616] and "the article portrays him as 'abusing his prosecutorial office by harassing a black college in order to ingratiate himself with the white voters in Chester County.'" 674 A.2d at 1053. In essence, he asserted that the article accused him of racism. Although a Pennsylvania Superior Court determined that, read in context, the challenged statement was not capable of defamatory meaning, the Supreme Court of Pennsylvania held that appellant's defamation action should not have been dismissed with prejudice because:

The [David Duke] statement . . . could be interpreted as more than a simple accusation of racism. . . . The statement could be construed to mean that appellant was acting in a racist manner in his official capacity as district attorney. . . . Although accusations of racism have been held not to be actionable defamation[**23] [under Pennsylvania law], it cannot be said that every such accusation is not capable of defamatory meaning as a matter of law.

674 A.2d at 1055.

Before considering the context of the article about Mr. Klayman, we emphasize the second part of the critical legal principle found in *Best*, supra: "The publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." 484 A.2d at 989 (citations omitted) (emphasis added). In *Guilford Transp. Indus., Inc.*, supra, we stressed that: [HN10] "The statements at issue should not be 'interpreted by extremes, but should be construed as the average or common mind would naturally understand [them].'" 760 A.2d at 594 (quoting 8 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 29:37 (1991)). Similarly, in *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E. 2d 136 (Va. 1998), the court said: "While 'every fair inference' in a pleading may be used to determine whether the words complained of are capable of a meaning ascribed by innuendo, inferences cannot extend the statements, by innuendo, beyond what would be the[**24] ordinary and common acceptance of the statement." 497 S.E.2d at 138 (citing *Carwile v. Richmond Newspapers*, 196 Va. 1, 82 S.E.2d 588, 592 (1954)). Applying the "ordinary and common acceptance of the statement" concept to an article which included the words "Director of Butt Licking" under the name of a college official, and considering the appellation in the context of the whole article, the Supreme Court of Virginia concluded that the words were not capable of defamatory meaning. *Id.*; see also *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) (affirming trial court's order granting dismissal of plaintiff's defamation action, relating to article stating that a "charity is charging hefty mark-ups on goods," 993 F.2d at 1093, sent to soldiers stationed in Saudi Arabia, after reference to "the plain and natural meaning of 'mark-up,'" 993 F.2d at 1093 n.7.). Following consideration of "the fair and natural meaning which [would] be given [to a letter] by reasonable persons of ordinary intelligence and examin[ation of] the publication as a whole and in context," the Third Circuit concluded that a letter sent to airline passengers and referring[**25] to a ticket sold to a passenger by a travel agency as "reported . . . stolen" was capable of defamatory meaning because it "emphasized to the reader that some type

of criminal misappropriation is involved." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 189-90 (3d Cir. 1998) (internal quotation marks and citation omitted).

With the foregoing cases in mind, we turn now to an analysis of The Washington Post article. The plain or fair and natural meaning of the words used by Mr. Segal in the article of October 25, 1999, would lead the average or common mind to conclude [*617] that the focus of the article, located in the business section of the newspaper and entitled "Guess Who's on the Line," was Mr. Klayman's efforts to appear frequently on television talk shows, and the reason for his frequent appearances. Thus, the lead sentence of the article asked unambiguously: "Ever wonder how Larry Klayman ends up on so many television talk shows?"

After posing the introductory question, the article proceeded to state the reason for Mr. Klayman's frequent appearance on television talk shows - - his free flowing political opinions and his leadership of a nonprofit organization [**26] that had filed multiple legal suits against the former Clinton presidential administration. n8 The article further explained the reason for Mr. Klayman's popularity with respect to television talk shows - - the possibility that he will appear with videotapes of depositions taken in his office, thus providing producers with sufficient material for the show. n9 Yet another reason for Mr. Klayman's frequent appearance on television talk shows, according to the article, was his insistence, (or as the article put it, his mastery of "old-fashioned badgering") that his public relations people "call a handful of talk show producers every single day, rain or shine, regardless of the day's news."

-----Footnotes-----

n8 The article stated: "No question, he's a spigot of political opinions, and as chairman of Judicial Watch - a nonprofit that has sued the Clinton administration more than a dozen times - he knows how to fulminate about the commander in chief."

n9 As the article put it: "Sometimes Klayman even brings his own videotape, lifted from recent depositions in his office. To producers, he's like a dinner guest who brings the meal, then cooks it."

-----End Footnotes-----

[**27]

To emphasize Mr. Klayman's persistent efforts to get on television talk shows, the next paragraph of the article posed questions and responses which were attributed to him by a "onetime employee." The questions and responses revealed that regardless of the tragic news of the day, Mr. Klayman demanded that his public relations people call the talk show producers and even sometimes suggested the approach to be taken with them. This paragraph of the article included the material in the last two sentences that Mr. Klayman asserts is capable of defamatory meaning:

"He would come in each morning and ask, 'Who have you called and why haven't you called?'" said the one[-]time employee, who requested anonymity. "If the show was doing Hollywood that night, he'd say call anyway. If they were doing Tiananmen Square he'd say, 'Well, I'm an international lawyer, try to pitch that.' If there were a school shooting, he'd say, 'So what? We're doing important things here.'"

(Emphasis added).

Finally, the last paragraph of the article revealed how one might be exposed to Mr. Klayman's Judicial Watch organization without waiting for his next television appearance. Readers were[**28] told that they could access Judicial Watch's web site and view the merchandise for sale, which included a "JW" [Judicial Watch] shirt, a JW windbreaker, and JW watches.

This detailed review of the whole article, and the challenged material, in context, demonstrates that the article's message centered on Mr. Klayman's drive for publicity, and that the article may not reasonably be read to accuse him of insensitivity to tragic events of the day, including the murder of innocent children. Indeed, we cannot say that the average or common mind would naturally understand the article as ascribing to Mr. Klayman insensitivity to the murder

of children. To be sure, the sentences with which Mr. Klayman [*618] takes issue, "If there were a school shooting he'd say, 'So what? We're doing important things here,'" could perhaps be viewed as unpleasant and offensive from Mr. Klayman's perspective, but such [HN11] perceived unpleasantness and offensiveness are not sufficient to sustain an allegation that material is reasonably capable of defamatory meaning. See Best, supra, 484 A.2d at 989. Indeed, the descriptions of Mr. Klayman's media efforts are not as unflattering as those which described the appellant[**29] in Weyrich, supra, making him appear to be "highly volatile, irrational [and] unsound." Nor does The Washington Post article use any known reference, as in MacElree, supra (reference to "the David Duke of Chester County"), likely to suggest an insensitivity, in this case, to the murder of children. If the challenged sentences make Mr. Klayman appear "odious, infamous or ridiculous," however, they are reasonably capable of a defamatory meaning. Id. (citation omitted).

Whether the challenged sentences of the article make Mr. Klayman appear "odious, infamous or ridiculous" is arguably a fairly close call. [HN12] The average or common mind would naturally understand "odious" to mean "arousing or deserving hatred or loathing"; "infamous" as "notorious" or "in disgrace or dishonor"; and "ridiculous" as "absurd" or "deserving ridicule," that is, "the act of making someone or something the object of scornful laughter by joking, mocking, etc." WEBSTER'S NEW WORLD DICTIONARY, 720, 986, 1224 (2nd coll. ed. 1982). However, a close contextual reading of the article, as in Foley, supra, reveals nothing that would invoke hatred or loathing for Mr. Klayman, or [**30] that would hold him in disgrace or dishonor, or that would subject him to scornful laughter. In the critical paragraph of the article, three examples are given of Mr. Klayman's alleged approach to his public relations employee. The first indicated that if the subject of a television talk show was Hollywood, Mr. Klayman instructed his employee to "call anyway." The second related to a tragedy as did the third illustration. If the television talk show's theme was Tiananmen Square, Mr. Klayman told his employee to "pitch" the fact that he is an international lawyer. The third illustration was the one at issue in this case, a school shooting such as that at Columbine. Consistent with the first two approaches, Mr. Klayman's alleged response was to urge his employee to understand the importance of Judicial Watch's work and to continue to try to schedule his appearance on a television talk show.

While, at first blush, these alleged responses might be considered harsh if uttered by a person who heads a "pro-life ethics organization," and might even be perceived as likely to have an impact on his standing in the community, nonetheless, our task is to apply the common definitions of the operative [**31] words, "odious, infamous, or ridiculous," and to consider the article as a whole. In doing so, we are constrained to hold that, when read in context, a reasonable person of ordinary intelligence would not understand the fair and natural meaning of the statement in question to be that Mr. Klayman is insensitive to the murder of innocent children. Therefore, we conclude that these words are not reasonably capable of defamatory meaning as a matter of law since they do not make Mr. Klayman appear "odious, infamous and ridiculous." Rather, when read in context, a reasonable person of ordinary intelligence would understand the words to convey the message that a school shooting tragedy should not interfere with an employee's scheduling of television talk show appearances to enable Judicial Watch to explain its public interest endeavors, even if scheduling appearances required pitching the public relations strategy to a [*619] major event of the day, such as the Tiananmen Square event.

We now turn to Mr. Klayman's false light invasion of privacy claim. We are required to determine whether as a matter of law the statement, "If there was a school shooting, he'd say, 'So what? We're doing important[**32] things here,'" placed Mr. Klayman "in a 'highly offensive false light,'" Weyrich, supra, 344 U.S. App. D.C. at 256, 235 F.2d at 628, in the eyes of "a reasonable person," Kitt, supra, 742 A.2d at 859. Mr. Klayman maintains that a polygraph n10 shows the statement in question to be false, and hence, it portrays him in an offensive false light. As the head of a "pro-life ethics organization," he is now perceived as putting personal gain and public exposure above the lives of innocent children. But, [HN13] "[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." Moldea II, supra, 306 U.S. App. D.C. at 10, 22 F.3d at 319 (quoting Moldea I, 304 U.S. App. D.C. at 420, 15 F.3d at 1151). Consequently, similar to our conclusion that the challenged statement did not make Mr. Klayman appear to be "odious, infamous or ridiculous," and for the same reasons, we are constrained to agree with the trial court that the statement did not place Mr. Klayman in "a 'highly offensive' false light." Weyrich, supra, 344 U.S. App. D.C. at 256, 235 F.3d at 628.[**33]

-----Footnotes-----

n10 Mr. Klayman attached to his complaint a report of a polygraph examination which allegedly showed that the quotation attributed to him was false. [HN14] "It is well settled that the results of lie detector tests are inadmissible in

783 A.2d 607, *, 2001 D.C. App. LEXIS 225, **

this jurisdiction." *Peyton v. United States*, 709 A.2d 65, 69 (D.C. 1998) (quoting *Contee v. United States*, 667 A.2d 103, 104 n.4 (D.C. 1995) (per curiam)); citing, inter alia, *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923)).

-----End Footnotes-----

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

Sterling LEESE, Jr. v. BALTIMORE COUNTY, et al.
No. 1599, September Term, 1984

Court of Special Appeals of Maryland

64 Md. App. 442; 497 A.2d 159; 1985 Md. App. LEXIS 469

September 9, 1985

PRIOR HISTORY: [***1]

APPEAL FROM THE Circuit Court for Baltimore County Austin W. Brizendine, JUDGE.

DISPOSITION: JUDGMENT AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEES.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former employee sought review of an order from the Circuit Court for Baltimore County (Maryland), which dismissed appellant's multi-count amended declaration against appellees, county and supervisors, for failure to state a claim upon which relief could be granted.

OVERVIEW: After his dismissal, appellant former employee brought a lawsuit against appellees, county and supervisors, alleging a number of constitutional and common law infractions. A trial court dismissed appellant's multi-count amended declaration against appellees for failure to state a claim upon which relief could be granted. Appellant sought review. The court affirmed the trial court's judgment in part and reversed in part. The court could not find any allegation in appellant's amended declaration that he was entitled to a merit position. The court found that appellant had not shown that his liberty interest in future employment was abridged. However, appellant adequately alleged that his challenge to the hiring process was a motivating factor in appellees' decision to dismiss him. Thus, appellant's amended declaration was sufficient to charge abusive discharge against all appellees. The court held that appellant's amended declaration sufficiently set forth a cause of action in libel per quod, and that appellant sufficiently alleged all the elements of defamation. The court concluded that actual malice was alleged by appellant.

OUTCOME: The court affirmed in part and reversed in part a trial court's judgment dismissing appellant former employee's multi-count amended declaration against appellees, county and supervisors, for failure to state a claim because appellant had not shown that he was entitled to a merit position or that his liberty interest in future employment was abridged, but appellant sufficiently charged abusive discharge, libel per quod, and defamation.

CORE TERMS: immunity, amended declaration, common law, First Amendment, hiring, defamatory, abusive, regulation, retaliation, liberty interest, part-time, property interest, declaration, Fourteenth Amendment, defamation, constitutional rights, actual malice, discharged, punitive damages, motion to dismiss, merit system, emotional distress, cause of action, stigmatizing, promotion, governmental immunity, redress, tenure, right to petition, firing

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Civil Procedure: Appeals: Standards of Review: Standards Generally

[HN1] Where a case is before an appellate court to review a dismissal for failure to state a claim upon which relief can be granted, the appellate court assume that the facts alleged in an amended declaration are true. Also, in conducting its review of the record, the appellate court looks only to see if the amended declaration truly represents a failure to state a claim upon which relief can be granted. Md. R. Civ. P., Cir. Ct. 2-322(b)(2). In other words, the appellant shall look to see if the appellant has alleged facts which, if proven, would entitle him to relief.

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage
[HN2] See 42 U.S.C.S. § 1983.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN3] Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. But, although the underlying substantive interest is created by an independent source such as state law federal constitutional law determines whether the interest rises to the level of a legitimate claim of entitlement protected by the due process clause.

Labor & Employment Law: Employment Relationships: At-Will Employment

Governments: Local Governments: Employees & Officials

[HN4] In the context of an employment setting, a property interest is defined as more than an employee's abstract need or desire for the position. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. To show this is seldom a simple task for the employee because, at common law, an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party. Government employment in the absence of legislation can be revoked at the will of the appointing officer. Accordingly, a property interest ordinarily can be said to exist only when there is a guarantee of continued employment or promotion.

Governments: Local Governments: Ordinances & Regulations

[HN5] A County Code procedure for promotion is merely procedure and not a guarantee of promotion.

Labor & Employment Law: Wrongful Termination: Breach of Contract

[HN6] To prove a claim that a claimant has a property interest in continued employment as a part-time employee, the claimant has to show that there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. These rules and understandings need not be set forth in written policies or regulations. Rather, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be implied. An employer's written policy statements can become a basis for a breach of contract action.

Governments: Local Governments: Employees & Officials

[HN7] Under the Baltimore County Charter, a classified and an exempted service are created. Baltimore, Md., County Charter § 801 (1978). The code provides that only members of the classified service are accorded full merit status, including protection against dismissal without cause. Baltimore, Md., County Code § 21-14. In sharp contrast to the ample job security granted merit employees, part-time employees are expressly excluded from merit system status. Baltimore, Md., County Code §21-24, R. 8.01.

Labor & Employment Law: Employment Relationships: At-Will Employment

Governments: Local Governments: Employees & Officials

[HN8] Baltimore, Md., County Code §21-24, R. 8.04 does not mention part-time employees. But the express exclusion of part-time employees from the merit system in Baltimore, Md., County Code §21-24, 8.01 negates any inference that a part-time employee has more job security than the positions listed in rule 8.04. Absent a code provision or regulation guaranteeing job security, the part-time employee is still an employee at will.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN9] "Liberty," as incorporated in U.S. Const. amend. XIV., is a concept that defies efforts to contain it within a precise definition. In an employment setting, a liberty interest has been recognized when the dismissal imposed upon the employee some stigma or disability that forecloses other employment opportunities. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that was the purpose of the Fourteenth Amendment to secure.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Constitutional Law: Substantive Due Process: Scope of Protection

[HN10] To invoke the liberty interest, a terminated employee must show that his former employer has published false statements about him. The failure to allege that the reasons for the dismissal were published dooms the claim. An employee must allege that the stigmatizing information was false. He must also show that these untruths are preventing

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

him from securing similar employment. Lastly, it must appear that the false information was of such a stigmatizing nature that it virtually foreclosed his freedom to take advantage of other employment opportunities.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Constitutional Law: Substantive Due Process: Scope of Protection

[HN11] In determining a stigmatizing dismissal from its nonstigmatizing counterpart, the focus is upon the charge used as grounds for termination and not the actual consequence of the charge. Thus, mere non-retention, without a statement of the reason behind it, is not sufficiently stigmatizing. Also, when given, the reasons for the dismissal must contain something considerably graver than a charge of failure to perform a particular job. Indeed, they must impute some sort of dishonesty, immorality, pressure to drop criminal charges, intoxication and the like. Thus, false statements that merely offer evaluation of an employee's work performance do not violate a liberty interest.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN12] The "liberty interest" is the interest an individual has in being free to move about, live, and practice his profession without the burden of an unjustified label of infamy. A charge, which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions outside of professional life.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN13] Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy. The distinction is not perfect; one's utility affects one's dignity and worth whether viewed from within or without. However, implicit in such a distinction is the notion that the constitutional need for procedural protection is not strong when the charge (e.g. incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Constitutional Law: Substantive Due Process: Scope of Protection

[HN14] A stigmatizing statement must include a very high order of derogation. Lesser adverse commentary may not be stigmatizing for due process deprivation purposes, even though it may be defamatory at common law. But there is no constitutional doctrine that converts every defamation by a public official into a deprivation of liberty within the meaning of the due process clause of U.S. Const. amend. XIV.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN15] The theory that public employment, which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. Specifically, when an employee exercises his U.S. Const. amend. I. rights to speak on matters of public concern, he cannot be dismissed in retaliation for having exercised his rights. To rule otherwise would allow the government to accomplish indirectly what it cannot do directly: silence protected speech.

Constitutional Law: Procedural Due Process: Scope of Protection

Constitutional Law: Substantive Due Process: Scope of Protection

[HN16] A dismissal in retaliation for exercising one's U.S. Const. amend. I. rights also triggers a liberty interest for purposes of invoking the due process protections under U.S. Const. amend. XIV. The remedies available for the violation of each of these separate constitutional provisions can be quite different. Under the due process clause the employee is entitled only to notice and an opportunity to be heard. For the violation of the First Amendment, the employer's decision is deemed to be unlawful, regardless of how much due process it accorded the dismissed employee.

Labor & Employment Law: Wrongful Termination

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN17] To establish a claim based on U.S. Const. amend I., a discharged employee must prove two elements. First, he must show that he was engaging in constitutionally-protected speech at the time of his discharge. Second, he must show that his conduct was a motivating factor in the employer's decision to fire.

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN18] The petition privilege is among America's most precious liberties. Occasionally the demands of the employer/employee relationship will allow the government employer to exert more control over an employee's exercise of his constitutional rights than it could over an ordinary citizen. But, if the employee's U.S. Const. amend. I. rights are to have any value, the employer cannot rely upon the need of the work place to justify a dismissal engineered to suppress criticism on matters of public concern.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN19] An employee's exercise of the petition right cannot serve as a basis for overturning his dismissal unless it touches upon a matter of public concern. In other words it must relate to any matter of political, social, or other concern of the community such as to bring to light actual or potential wrongdoings or breach of public trust on the part of government officials. When it relates to speech solely in the individual interest of the speaker and his specific business audience. Government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of U.S. Const. amend. I. To determine whether the exercise of the petition right addresses a matter of public concern the court must look to its content, form, and context as revealed by the record as a whole.

Labor & Employment Law: Wrongful Termination

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN20] A claim for abusive discharge must allege that the employee was discharged; the dismissal violated some clear mandate of public policy; and there is a nexus between the defendants and the decision to fire the employee. Absent any one of these elements, an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN21] To state a cause of action for intentional infliction of emotional distress, the appellant's amended declaration must have alleged the following four elements: (1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN22] In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred. Extreme and outrageous conduct exists only if the average member of the community must regard the defendant's conduct as being a complete denial of the plaintiff's dignity as a person.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN23] To meet the standard of alleging that the emotional distress was severe, a plaintiff has to allege in effect that he suffered a severely disabling emotional response, so acute that no reasonable man could be expected to endure it.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

Torts: Defamation & Invasion of Privacy: Libel

[HN24] For a complaint alleging libel to withstand the test of a motion to dismiss it must allege: (1) a false and defamatory communication, which the maker knows is false and knows it defames the other, or that the maker has acted in reckless disregard of these matters, or that the maker has acted negligently in failing to ascertain them, and (2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory, and (3) allegations of damages with some particularity.

Torts: Defamation & Invasion of Privacy: Libel

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN25] A statement is defamatory if it exposes the person who is the subject of it to public scorn, hatred, contempt or ridicule and thus injures reputation. A written statement is libel per se when the words themselves impute the defamatory

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

character. And it is defamatory to utter any slander or false tale of another, which may impair or hurt his trade or livelihood. Thus, a statement that adversely affects an employee's fitness for the proper conduct of his business is actionable per se at common law.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN26] The words must go so far as to impute to him some incapacity or lack of due qualification to fill the position. In other words, the defamatory statement must be such that if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN27] A statement that one has failed to demonstrate ability to assume a professional management role does not in and of itself charge lack of that ability. If the employment in question were of short duration, it might not impute any lack of qualification, but simply a need for more time on the job to develop the requisite ability. And if the job did not in fact involve a professional management role it might not be derogatory at all.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN28] A defamatory statement dealing with reasons for an employee's discharge may be privileged if communicated to fellow-employees or to a recipient (such as a prospective new employer) who justifiably is entitled to receive it. But the conditional privilege may be lost if it is abused. Abuse occurs when the statement is made with 1) a reckless disregard for its truth, 2) it is not made in furtherance of the interest for which the privilege exists, or 3) it is communicated to a third person other than one whose hearing is reasonably believed to be necessary or useful to the protection of the interest. While the existence of a privilege is an issue of law, its forfeiture by abuse is an issue of fact.

Torts: Defamation & Invasion of Privacy: Defamation Actions

Torts: Defamation & Invasion of Privacy: Qualified Privileges

[HN29] As in the case of qualified privilege in a defamation claim, governmental immunity, public official immunity, and "good faith" immunity under 42 U.S.C.S. § 1983 are generally matters of defense. But, again as in the case of qualified privilege, if a complaint shows the potential existence of an immunity on its face, that defense is available on motion to dismiss.

Torts: Public Entity Liability: Immunity

[HN30] The doctrine of sovereign immunity has survived repeated challenges over the years and remains as a formidable obstacle to those who attempt to sue a governmental entity. Not all governmental entities, however, are treated equally. Although the state's former near-complete immunity from all suits in tort and contract has been substantially eroded by statute, Md. Code Ann., State Gov't §§ 12-101-12-204, municipalities and counties have been traditionally cloaked with a more limited immunity, also (at least in contract) somewhat modified by statute.

Torts: Public Entity Liability: Immunity

Governments: Local Governments: Claims By & Against

[HN31] Under Maryland common law unlike the total immunity from tort liability, which the state and its agencies possesses, the immunity of counties, municipalities, and local agencies is limited to tortious conduct which occurred in the exercise of a "governmental" rather than a "proprietary" function. By its terms this standard applies only in tort actions. Where a county is attempting to assert governmental immunity as a bar to a contract claim, the common law allows it to abrogate its responsibility under a contract entered into in performance of a governmental function if dictated by the public good. This is not to suggest that counties and municipalities are fully immunized against contractual liability. Rather, they are answerable in damages incurred to the time of cancellation.

Administrative Law: Sovereign Immunity

Governments: Local Governments: Claims By & Against

[HN32] Under Md. Ann. Code art. 25A, § 1A(a) (1984), a chartered county may not raise the defense of sovereign immunity in an action in contract based upon a written contract executed on behalf of the county or its department, agency, board, commission or unit by an official or employee acting within the scope of his authority. In sum, before governmental immunity can be asserted in either a contract or tort claim, it must appear that the county committed the

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

infraction while it was engaged in a governmental function. And, in a contract case, the bar only applies to damages incurred after the breach of a contract that does not fall within § 1A.

Governments: Local Governments: Claims By & Against

Contracts Law: Breach: Causes of Action

[HN33] By its terms, Md. Ann. Code art. 25A, § 1A requires a written contract that was executed on behalf of the county. A failure to meet either of these requirements nullifies the operation of the section.

Torts: Public Entity Liability: Immunity

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN34] While governmental immunity immunizes political subdivisions against the torts committed by their employees, it does not offer the same protection to all the employees who commit the alleged wrongs. To guard against the hardship that this exposure to liability would place on certain public servants, the courts have fashioned the doctrine of public official immunity. This doctrine, however, only becomes an issue when 1) The public servant is a public official; 2) the alleged culpable conduct was committed by him while acting in a discretionary capacity; and 3) the official acted without actual malice.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN35] The actual malice needed to defeat official immunity requires an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff. Actual malice does not always have to be shown with specificity; it can be inferred.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN36] Municipalities and counties are not immune from suit. Based on statutory construction and policy reasons, certain official immunities long-recognized at common law have been deemed to apply in 42 U.S.C.S. § 1983 cases.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN37] The policies supporting the extension of official immunity have been justified on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to exercise his office with the decisions and public judgment required by the public good. Furthermore, the threat of personal liability might deter citizens from holding public office. These common law immunities, as preserved under 42 U.S.C.S. § 1983, apply with equal force to common law actions for violations of constitutional rights.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN38] The court has recognized absolute and qualified immunities. Absolute immunity shields those officials whose special functions or constitutional status requires complete protection from suit. The following is a list of officials cloaked with absolute immunity: legislators, in their legislative functions, and judges, in their judicial functions. Absolute immunity also extends to certain officials of the Executive Branch. These include prosecutors and similar officials, executive officers engaged in adjudicative functions, and the President of the United States.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Affirmative Defenses

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN39] Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. The "good faith" defense has both an objective and a subjective aspect. The objective element involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights. The subjective component refers to permissible intentions. Characteristically the court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Qualified immunity is defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

[HN40] With regard to a knowing violation of a constitutional right, the essential focus is whether the law existing at the time of the alleged violation proscribed what occurred. An official has, of course, no duty to anticipate unforeseeable constitutional developments. When the law is settled, however, it is difficult for the official to argue his ignorance of it because the law charges a reasonably competent official with knowing the law governing his conduct.

Evidence: Procedural Considerations: Inferences & Presumptions

Constitutional Law: Civil Rights Enforcement: Immunity: Public Officials

[HN41] Rather than the actual malice standard required under Maryland's official immunity law, the federal 42 U.S.C.S. § 1983 counterpart can be satisfied by either actual malice or its legal equivalent. The latter includes a reckless disregard for the injured party's rights. To meet the burden of pleading malice, an appellant's amended declaration must contain more than his legal conclusion on the issue.

Torts: Business & Employment Torts: Wrongful Termination

Torts: Damages: Punitive Damages

[HN42] The tort of abusive discharge is one arising out of contract, thus requiring proof of actual malice as a prerequisite to the recovery of punitive damages. As to a defamation claim, if liability is established under it, punitive damages are recoverable. So far as a 42 U.S.C.S. § 1983 claim is concerned, even if liability under it is demonstrated by proof, the county is not subject to punitive damages.

COUNSEL: J. Carroll Holzer, Towson, Maryland (Holzer, Maher & Demilio, Towson, Maryland, on the brief), for appellant.

L. Paul Snyder, Jr., Assistant County Attorney, Towson, Maryland Jr., County Attorney, Towson, Maryland, on the brief), for appellees.

JUDGES: Garrity, Adkins and Getty, * JJ.

* Judge Getty participated in the hearing and conferencing of this case but retired before the opinion was filed.

OPINIONBY: ADKINS

OPINION: [*450] [**163] This case had its genesis in the circumstances surrounding Baltimore County's decision to terminate the employment of the appellant, Sterling Leese, Jr., as the director of its senior citizen transportation network. After his dismissal, Leese brought suit against the appellees -- the county and several of its supervisory employees -- alleging a number of constitutional and common law infractions. To this initial declaration, the court below sustained a demurrer. [***2] Leese filed a thirty-two page amended declaration. That was dismissed for failure to state a claim upon which relief could be granted. Leese appealed. Here, he argues that the lower court erred in granting the motion to dismiss his multi-count amended declaration. We agree in part and reverse.

FACTUAL BACKGROUND

According to the well-pleaded facts in his amended declaration, Leese was employed by appellee Baltimore County from August of 1976 until October of 1982. During that period, he planned, implemented and managed the county's "Senioride" program. At the outset, the Senioride program was administered under the county's Department of Social Services. In 1979, however, it was assigned to the newly-created Department of Aging. This brought Leese into contact with appellee Timothy Fagan, the Director of the Department of Aging.

[*451] Throughout his tenure as the director of Senioride Leese's position was classified as [**164] "part time." Under the county's merit system, part-time employees were expressly denied tenure or any of the other legal protections accorded merit employees. In an effort to obtain the benefits of the merit system, Leese was successful[***3] in persuading Fagan to create a new position, designated "Senior Affairs Associate II (Supervisor Senioride Services)." Because this new position conferred full-time merit status, it had to be filled according to the procedures set forth in the

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

county code and regulations. Specifically, the position had to be posted and a test had to be given. Those who cleared these first two hurdles were interviewed by the hiring authority. In this case the hiring authority was Timothy Fagan.

Leese successfully completed the first two steps: he met the criteria in the posting and he achieved the highest score on the exam. At this point, his application, along with others, was forwarded to the hiring authority for an interview. Rather than conducting the interviews himself, Fagan delegated this chore to a panel of supervisory employees: appellees Ellen Yerman, Majorie Fortner, and Gloria Albinok.

Instead of receiving the fair interview that he claims he was due under the Baltimore County Administrative Code and Regulations, Leese asserts that his interview was a sham. In the words of his amended declaration, "the Selection Committee . . . and the Director of Aging were predisposed to eliminate [***4][Leese] as a candidate for the merit system position as a result of personal bias and without official and reasonable justification." He further asserts that the "Committee established a different standard to judge [him] during the oral interview, than was used to judge the other candidates, all to [his] prejudice."

This tainted interviewing procedure, Leese asserts, was incorporated in a report to Fagan that stated that Leese "has not demonstrated ability to assume a professional management role beyond daily operations." Acting upon [*452] this report, Fagan and the "ultimate Appointing Officer," B. Melvin Cole, directed that someone other than Leese be selected to fill the merit position. Nevertheless, Leese was retained in a new non-merit part-time position, at a reduced salary, "in which he [was] responsible for continuing his duties of day to day operation of the Senioride Program as well as additional responsibilities."

The decision not to place Leese in the merit position prompted him to challenge the propriety of the hiring process. He retained counsel and began the steps necessary to appeal the decision. Shortly after his attorney contacted Fagan and informed[***5] him of the basis for this challenge, Leese was summarily fired. The amended declaration averred that this occurred in "retaliation for exercising his legal rights to appeal" the decision to hire someone other than Leese.

In spite of his dismissal, Leese pursued his administrative appeal of the hiring decision. The matter was first brought before Administrative Officer B. Melvin Cole. When he found no impropriety with the hiring process, a further appeal was taken to the Personnel and Salary Advisory Board of Baltimore County. In an evenly-split decision (2-2), the Board upheld the hiring process.

Undaunted by his lack of success with his administrative appeals, Leese filed a nine-count declaration in the Circuit Court for Baltimore County. The first three counts focused on procedural improprieties in the hearing before the personnel board. Counts IV and VII alleged that the tainted review of Leese's credentials violated the county charter, code, and administrative regulations and thereby denied Leese due process of law under the Fourteenth Amendment to the United States Constitution. Similarly, in counts V and VIII, Leese asserted that he was denied due process when his employment[***6] was summarily terminated, and that his dismissal was an unconstitutional retaliation to the exercise of his First Amendment rights. He also averred that these claims amounted to an [**165] abusive discharge under [*453] Maryland's common law. Counts VI and IX alleged that Leese was defamed by critical statements that were placed in his personnel records. n1

-----Footnotes-----

n1. In each of the paired counts, the lower numbered count named the county as a defendant; the higher numbered counts sued the supervisory employees.

-----End Footnotes-----

When a demurrer to this initial pleading was sustained with leave to amend, the appellant filed an "amended declaration." n2 This pleading included counts I through IX from the initial declaration and added claims for violations of 42 U.S.C. § 1983 and a claim for intentional infliction of emotional distress. To this amended declaration, the trial court granted a motion to dismiss and entered judgment in favor of the appellees.

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

-----Footnotes-----

n2. We note that this second declaration was filed after the new Maryland Rules had taken effect. Under the new rules, the initial pleading is titled a "complaint," not a "declaration." Md.Rule 2-302. Additionally, the new rules command that "[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances." Md.Rule 2-303(a). Many of the amended declaration's long-winded paragraphs are anything but a "single set of circumstances." Were this the trial court, a motion to strike this defective pleading would be in order. Md.Rule 2-322(e). But, since the issue was not raised below, we shall not address it here. Md.Rule 1085.

-----End Footnotes-----

[***7]

ISSUES

Before addressing the many questions presented by this case, it is important to define precisely what the issues are. In doing this, we are cognizant that [HN1] this case is before us to review a dismissal for failure to state a claim upon which relief can be granted. Accordingly, we must assume that the facts alleged in the amended declaration are true. *Ungar v. State*, 63 Md.App. 472, 479, 492 A.2d 1336 (1985). Also, in conducting our review of the record, we look only to see if the amended declaration truly represented a "failure to state a claim upon which relief can be granted." Md.Rule 2-322(b)(2). In other words, we shall look to see if Leese has alleged facts which, if proven, would entitle him [*454] to relief. *Dick v. Mercantile-Safe Dep. and Trust Co.*, 63 Md.App. 270, 273, 492 A.2d 674 (1985).

With this in mind, we believe that the following issues have been properly preserved and presented: n3

I. Due Process/ 42 U.S.C. § 1983

Has Leese alleged facts sufficient to show that:

A. In light of the Baltimore County Code and its accompanying rules and regulations he had a due process right to a fair appraisal of his qualifications for a merit system position? [***8]

B. Under the due process clause of the Fourteenth Amendment to the U.S. Constitution, he, as a part-time non-merit status employee, had a proprietary interest in his continued employment?

C. By including in his personnel file allegedly false statements about his performance as a manager, the appellees stigmatized the appellant so as to deprive him of liberty without due process of law?

II. First Amendment/ 42 U.S.C. § 1983

Has Leese alleged facts sufficient to show that the county unconstitutionally fired him in retaliation for exercising his First Amendment rights?

III. Abusive Discharge

Has the appellant sufficiently alleged all the elements of an abusive discharge?

IV. Emotional Distress

A. Do the allegations concerning the appellee's conduct with regard to the appellant sufficiently charge extreme and outrageous behavior?

[**166] B. Are the injuries alleged to have been suffered by the appellant sufficiently severe?

[*455] V. Defamation

A. Has the appellant adequately alleged that the statements about his work performance were defamatory and published, and that they have caused him actual injury?

B. Are the defamatory remarks privileged?

VI. Immunities[***9]

A. Are the common law tort and contract claims against the county barred by governmental immunity?

B. Are the common law tort and contract claims against the county employees barred by Maryland's common law public official immunity?

C. Are the constitutional claims incorporated in the 42 U.S.C. § 1983 claim barred by the official immunities?

VII. Punitive Damages

Are punitive damages recoverable if the appellant ultimately prevails on the claims that must be remanded?

-----Footnotes-----

n3. The issues raised in the first three counts of the amended complaint have not been raised on appeal and are not before us. See *Jacobson v. High Hill Realty, Inc.*, 22 Md.App. 115, 125, 321 A.2d 838 (1974).

-----End Footnotes-----

I. Due Process/ 42 U.S.C. § 1983

The bulk of the appellant's disagreement with the lower court's decision focuses upon its unwillingness to allow him to challenge the constitutionality of the appellee's hiring and firing decisions. Pleading his case under both the common law n4 and 42 U.S.C. § 1983 n5 Leese asserted that[***10] [*456] each of these employment decisions was made without according him the notice and hearing he believes were guaranteed him under the due process clause of the Fourteenth Amendment.

-----Footnotes-----

n4. *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921 (1984) recognized that a common law cause of action exists for both violations of the U.S. Constitution and its Maryland counterpart. Since the appellant has not raised the applicability of any provision of the Maryland Constitution to the facts of this case, we, shall confine our decision solely to matters of federal constitutional law. For an interesting discussion of "constitutional" causes of action available to federal employees, see Smith, "Bivens Actions for Federal Employees in the Aftermath of *Bush v. Lucas*: Which Remedies for Whom?" 14 U. of Balt.L.Rev. 413 (1985).

n5. [HN2] 42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

-----End Footnotes-----

[***11]

Before the appellant can be allowed to proceed with either his common law or § 1983 action, it must appear that there has been a violation of the Fourteenth Amendment by the appellees. In other words, the amended declaration must have alleged that the appellees deprived the appellant of "life, liberty or property, without due process of law." U.S. Const. Amendment XIV. Unless we are able to find that Leese has alleged that he was deprived of one of these predicate interests, his due process claims have no merit. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

A.1. Property Interest

As the United States Supreme Court recently reaffirmed, [HN3] "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Board of Education v. Loudermill*, U.S. , 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) (quoting *Roth*, 408 U.S. at 577 92 S.Ct. at 2709). But, "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional[***12] law determines whether the interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Steinberg v. Elkins*, 470 F.Supp. 1024, 1030 (D.Md.1979) (quoting *Memphis [**167] Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978)).

[HN4] In the context of an employment setting, a property interest is defined as "more than [an employee's] abstract [*457] need or desire [for the position]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709 [emphasis supplied]. To show this is seldom a simple task for the employee because, at common law, "an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party." *Adler v. American Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464 (1981). See also *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961) ("government employment in the absence of legislation can be revoked at the will of the appointing officer"). Accordingly, [***13] a property interest ordinarily can be said to exist only when there is a guarantee of continued employment or promotion. See *Andre v. Montgomery County Personnel Board*, 37 Md.App. 48, 63-64, 375 A.2d 1149 (1977).

A.2. Property Interest in Merit Position

Turning to the appellant's contention that he had a property interest in being appointed to the merit position, we cannot find any allegation in his amended declaration that he was entitled to the merit position. Nor do we believe that under the Baltimore County merit system it would have been possible for the county government to guarantee a position to any applicant for employment. Indeed, as the appellant contends in his challenge to the selection process, the code and its accompanying regulations command that the selection process focus upon the merits of each candidate's qualifications.

Leese apparently concedes that he was not guaranteed the merit position. He argues that although he was not entitled to the position itself, he was entitled to have his qualifications reviewed in the impartial manner set forth in the county code and regulations.

In *Andre* this court was confronted with a nearly identical claim. [***14] There, teachers had been denied promotions [*458] because the hiring authority had allegedly "ignored, bent or twisted the personnel lists to suit his own whim." 37 Md.App. at 58, 375 A.2d 1149. Rejecting the due process argument, we recognized that [HN5] "[t]he County Code procedure for promotion is merely procedure and not, as appellants would like, a guarantee of promotion." *Id.* at 64, 375 A.2d 1149. Leese's due process challenge to the hiring process must fail for the same reason. The ultimate decision to fill the merit position was discretionary, and he has not alleged any facts that would show that the hiring procedures required the discretion be exercised in his favor. See *McFarlane v. Grasso*, 696 F.2d 217, 222 (2d Cir.1982). And see *Bigby v. Chicago*, 766 F.2d 1053 (7th Cir.1985) (police sergeant has no property interest in promotion to lieutenant).

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

Thus, the county's personnel rules and regulations do not confer the property interest needed to trigger the protections of due process.

B. Property Interest in Part-Time Position

Leese also asserts that he had a property interest in continued employment as a part-time employee. [HN6] To prove this claim, Leese[***15] would have had to show that "there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972). These rules and understandings need not be set forth in written policies or regulations. Rather, as the court recognized in *Perry*, "the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'" *Id.* at 601-02, 92 S.Ct. at 2700 (quoting 3 A. Corbin, Corbin [**168] on Contracts §§ 561-72A (1960)). See also *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md.App. 381, 388-92, 486 A.2d 798, cert. denied, 303 Md. 295, 493 A.2d 349 (1985) (employer's written policy statements can become basis for breach of contract action).

Seizing upon this language, Leese attempts to generate an issue of fact over whether the county's dealings with [*459] him amounted to a contract that "he would not be dismissed unless he failed to perform his job duties as required and that he had protection and security." The appellant's contentions overlook the combined[***16] operation of the Baltimore County Charter, Code and Rules and Regulations. [HN7] Under the charter, a classified and an exempted service are created. Baltimore County Charter § 801 (1978). The code provides that only members of the classified service are accorded full merit status, including protection against dismissal without cause. Baltimore County Code 21-14. See also § 21-21, Rule 15 (creating protections against dismissal for "[a]ny member of the classified service"). In sharp contrast to the ample job security granted merit employees, part-time employees are expressly excluded from "merit system status." Rule 8.01. See also Rule 8.04 (stating that "[e]mployees serving in emergency, temporary or provisional appointments . . . may be dismissed from their jobs at any time"). n6 Accordingly, any argument that Leese was given job security under the charter, code or regulations is frivolous.

-----Footnotes-----

n6. [HN8] Rule 8.04 does not mention part-time employees. But the express exclusion of part-time employees from the merit system in Rule 8.01 negates any inference that a part-time employee has more job security than the positions listed in Rule 8.04. Absent a code provision or regulation guaranteeing job security, the part-time employee is still an employee at will.

-----End Footnotes-----

[***17]

Perhaps on rare occasions an employee may be able to show that, in spite of non-merit status, the realities of the workplace are such that an informal tenure system exists. *Steinberg v. Elkins*, 470 F.Supp. 1024, 1029 (D.Md.1979). In *Perry*, for instance, the court held that a faculty guide which contained the following paragraph conferred de facto tenure:

Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he [*460] displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

408 U.S. at 600, 92 S.Ct. at 2699. See also *Steinberg*, 470 F.Supp. at 1027-28 (faculty committee voted to grant professor tenure without taking the necessary step of obtaining administration approval).

Unlike the faculty member in *Perry*, the appellant can point to no specific employer-authored policy statement that conferred any job security. Nor has he alleged that any actions were taken by the appellees to confer such status. Thus, much like the untenured[***18] faculty member in *Roth*, the appellant had only "an abstract concern" in retaining his position with Baltimore County. 408 U.S. at 578, 92 S.Ct. at 2710. Hence, his property interest claims must fail.

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

C. Liberty Interest

[HN9] "Liberty," as incorporated in the Fourteenth Amendment of the U.S. Constitution, is a concept that defies efforts to contain it within a precise definition. In an employment setting, a liberty interest has been recognized when the dismissal "imposed upon [the employee] some stigma or disability that forecloses other employment opportunities." *Elliott v. Kupferman*, 58 Md.App. 510, 519, 473 A.2d 960 (1984). See also *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707. The reason for recognizing a liberty interest in this instance was explained by the Supreme Court long ago: "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that was [**169] the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915), quoted in *In Re Griffiths*, 413 U.S. 717, 720, 93 S.Ct. 2851, [***19] 2854, 37 L.Ed.2d 910 (1973).

[HN10] To invoke this liberty interest, the terminated employee must show that his former employer has published false statements about him. *Cleveland Board of Education [*461] v. Loudermill*, U.S. , n. 13, 105 S.Ct. 1487, 1496 n. 13, 84 L.Ed.2d 494 (1985) ("the failure to allege that the reasons for the dismissal were published dooms [the] claim"); *Codd v. Velger*, 429 U.S. 624, 627-28, 97 S.Ct. 882, 883-84, 51 L.Ed.2d 92 (1977) (per curiam) (must allege that stigmatizing information was false). He must also show that these untruths are preventing him from securing similar employment. *Roth*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13. Lastly, it must appear that the false information was of such a stigmatizing nature that it virtually "foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707.

Examining these elements in reverse order, we note that Leese asserts that he has been "stigmatized" because the appellees branded him as "not having demonstrated ability to assume a professional management role beyond daily operations." He also claims to have been stigmatized[***20] by the inclusion of a "termination ticket" which states that "due to the employee's work history, the level and scope of positions for which he is eligible are restricted." We believe that he misreads the proper definition of the term "stigmatize."

In recognizing that an employee has a liberty interest in being able to find future employment, the Supreme Court did not create a constitutional cause of action against every employer or supervisor who gives an employee an unfavorable review. The *Roth* court speaks in terms of a stigma that is so disabling that it virtually forecloses other employment opportunities. 408 U.S. at 573-74, 92 S.Ct. at 2707-08. See also *Bigby v. Chicago*, supra, and *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir.1972); *Smith v. Bd. of Education*, 708 F.2d 258, 265-66 (7th Cir.1983).

[HN11] In determining a stigmatizing dismissal from its nonstigmatizing counterpart, the focus is "upon the charge used as grounds for termination and not the actual consequence of the charge." *Stretten v. Wadsworth Veterans [*462] Hosp.*, 537 F.2d 361, 365 (9th Cir.1976). Thus, mere non-retention, without a statement of the reason behind it, is not sufficiently stigmatizing. [***21]*Roth*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13. Also, when given, the reasons for the dismissal must contain "something considerably graver than a charge of failure to perform a particular job." *Russell*, 470 F.2d at 217. Indeed, they must impute some sort of "dishonesty, immorality, pressure to drop criminal charges, intoxication and the like." *Smith*, 708 F.2d at 266 n. 6. See also *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707 (dismissal based on charges that an employee "had been guilty of dishonesty, or immorality" would be sufficiently stigmatizing). Thus, false statements that merely offer evaluation of an employee's work performance do not violate a liberty interest. See *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir.1985) (employee disobeyed orders); *Hadley v. County of DuPage*, 715 F.2d 1238 (7th Cir.1983) (mismanagement), cert. denied, U.S. , 104 S.Ct. 1000, 79 L.Ed.2d 232 (1984); *Gray v. Union Intermediate County Education District*, 520 F.2d 803, 806 (9th Cir.1975) (insubordination, incompetence hostility toward others); *Blair v. Board of Regents*, 496 F.2d 322, 324 (6th Cir.1974) (failure to meet minimum professional standards). [***22]

Explaining this often difficult distinction, the *Stretten* court offered the following guidance:

[HN12]

The 'liberty interest' is the interest an individual has in being free to move about, live, and practice his profession without the burden of an unjustified label of infamy. *Board of Regents v. Roth*, 408 U.S. at 572, 92 S.Ct. at 2706, 33 [**170] L.Ed.2d at 557. In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions outside of professional life. [HN13] Liberty is not infringed by a

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more [*463] notches in the professional hierarchy. The distinction is not perfect; our utility affects our dignity and worth whether viewed from within or without. However, implicit in such a distinction is the notion that the constitutional need for procedural protection is not strong when the charge (e.g. incompetence) involves[***23] a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession. n7

537 F.2d at 366.

-----Footnotes-----

n7. As the authorities cited show, [HN14] a stigmatizing statement must include a very high order of derogation. Lesser adverse commentary may not be stigmatizing for due process deprivation purposes, even though it may be defamatory at common law. See Part V of this opinion. But there is no constitutional doctrine that "converts every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." Paul v. Davis, 424 U.S. 693, 702, 96 S.Ct. 1155, 1161, 47 L.Ed.2d 405 (1976).

-----End Footnotes-----

Nowhere in his amended declaration does Leese assert that he has been labeled dishonest or immoral. Rather, the questioned personnel[***24] records merely comment on his lack of ability to perform a particular job. This is, as a matter of law, insufficient, under the authorities cited above, to trigger a liberty interest. Since we find that the appellant has not alleged facts that show he has been sufficiently stigmatized, we need not review the other elements. He has not shown that his liberty interest in future employment has been abridged.

II. First Amendment/ 42 U.S.C. § 1983

Although the previous discussion shows that the employment at will doctrine is alive and well in Maryland, there are certain constitutional limitations on the government's authority to fire its employees. As the Supreme Court has recognized, [HN15] "the theory that public employment [*464] which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589, 605-06, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967). Specifically, when an employee exercises his First Amendment rights to speak on matters of public concern, he cannot be dismissed in retaliation for having exercised his rights. Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. [***25] 1684, 1690, 75 L.Ed.2d 708 (1983); DeBleecker v. Montgomery County, 292 Md. 498, 506-07, 438 A.2d 1348 (1982). n8 To rule otherwise would allow the government to accomplish indirectly what it cannot do directly: silence protected speech. Perry, 408 U.S. at 597, 92 S.Ct. at 2697.

-----Footnotes-----

n8. [HN16] A dismissal in retaliation for exercising one's First Amendment rights also triggers a liberty interest for purposes of invoking the due process protections under the Fourteenth Amendment. Elliott, 58 Md.App. at 519, 473 A.2d 960. The remedies available for the violation of each of these separate constitutional provisions can be quite different. Under the due process clause the employee is entitled only to notice and an opportunity to be heard. For the violation of First Amendment, the employer's decision is deemed to be unlawful, regardless of how much due process it accorded the dismissed employee.

-----End Footnotes-----

[HN17] To establish a claim based on the First Amendment, the discharged employee must prove two elements. First, he must[***26] show that he was engaging in constitutionally-protected speech at the time of his discharge.

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

DiGrazia v. County Executive for Montgomery County, 288 Md. 437, 447-52, [**171]418 A.2d 1191 (1980). Second, he must show that "his conduct was a . . . 'motivating factor' in the [employer's] decision to [fire]." Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). We believe that Leese has alleged sufficient facts to meet both of these prerequisites.

The protected First Amendment freedom that is alleged to have prompted his dismissal was his decision to contest what he believed was an unfair hiring process. This was an exercise of his First Amendment right to petition [*465]government for redress of grievances. n9 See McDonald v. Smith, U.S. , 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985); Miner v. Novotny, 60 Md.App. 124, 481 A.2d 508 (1984), cert. granted, 302 Md. 239, 486 A.2d 1196 (1985). n10 As we noted in Miner, [HN18] "[t]he petition privilege is among our most precious liberties." Id. at 129, 481 A.2d 508. We recognize, though, that occasionally the demands of the employer/employee[***27] relationship will allow the government employer to exert more control over an employee's exercise of his constitutional rights than it could over an ordinary citizen. See Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); DiGrazia, 288 Md. at 449, 418 A.2d 1191. But, if the employee's First Amendment rights are to have any value, the employer cannot rely upon the need of the work place to justify a dismissal engineered to suppress criticism on matters of public concern. Tortman v. Board of Trustees, 635 F.2d 216, 229 (3d Cir.1980), cert. denied sub nom., Lincoln University v. Trotman, 451 U.S. 986, 101 S.Ct. 2320, 68 L.Ed.2d 844 (1981). See also Perry, 408 U.S. at 597-98, 92 S.Ct. at 2697-98 (faculty member unlawfully fired for testifying before a committee of the Texas state legislature). n11

-----Footnotes-----

n9. The appellant confines his argument to the right to petition. We note, however, that the communications of information to the county's personnel review board was also an exercise of the First Amendment right to freedom of speech. See DeBleeker, 292 Md. 507-10, 438 A.2d 1348. [***28]

n10. In Sherrard v. Hull, 53 Md.App. 553, 456 A.2d 59, aff'd, 296 Md. 189, 460 A.2d 601 (1983) and its progeny the First Amendment right to petition government for the redress of grievances was viewed as one having a specially protected status under the First Amendment. The McDonald court, to the contrary, held that the petition right should be treated on the same basis as other First Amendment rights. That does not affect the result in this case. The right to petition remains a First Amendment right. As such, its exercise, standing alone, cannot form the basis for a dismissal.

n11. Since this case arrives in this court to review a granted motion to dismiss an amended declaration, the defenses associated with the needs of the workplace have not yet been placed in issue; nor have they been raised by the parties in either their briefs or at oral argument. Accordingly, we do not decide the issue here. Md.Rule 1085.

-----End Footnotes-----

[*466] In what is perhaps inartful pleading, Leese asserted that his discharge "was not prompted by a genuine dissatisfaction as to his performance as an[***29] employee, but was motivated by retaliation for exercising his legal right to appeal." In making this allegation, the appellant has sufficiently alleged "statements of fact as may be necessary to show the pleader's entitlement to relief." Md.Rule 2-303(b). The amended declaration in substance charges that Leese was dismissed because he exercised his right to petition the government for redress of a grievance.

Although the appellant's exercise of the petition right was a valid exercise of a constitutional right, [HN19] it cannot serve as a basis for overturning his dismissal unless it touched upon a matter of "public concern." Connick v. Myers, 461 U.S. at 147-48, 103 S.Ct. at 1690-91. In other words it must relate "to any matter of political, social, or other concern of the community . . . [such as] to bring to light actual or potential wrongdoings or breach of public trust on the part of [government officials]." Id. at 146-48, 103 S.Ct. at 1689-91. When it relates to "speech solely in the individual interest of the speaker and [his] specific [**172] business audience," Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., U.S.

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

, , 105 S.Ct. 2939, 2947, [***30]86 L.Ed.2d 593 (1985), the Supreme Court has determined that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick, 461 U.S. at 146, 103 S.Ct. at 1689. To determine whether the exercise of the petition right addressed a matter of public concern we must look to its "content, form, and context . . . as revealed by the record as a whole." Dun & Bradstreet, Inc., U.S. at , 105 S.Ct. at 2947 (quoting Connick, 461 U.S. at 147-48, 103 S.Ct. at 1690-91).

[*467] Looking first to the content of Leese's petition, it is clear that he has alleged serious violations of the county's merit system. It is indisputably in the public's interest to be kept abreast of such serious improprieties in the methods used to select its civil servants. At the very least, the misuse of the hiring power by public officials represents a "breach of public trust." Connick, 461 U.S. at 148, 103 S.Ct. at 1690. The form and context chosen by the appellant to exercise the petition privilege strengthen our conclusion that he was addressing a matter of public concern. Rather than [***31]airing his view privately, he challenged the hiring process by appealing administratively twice and by litigating this case in court. In short, he was engaging in a protected exercise of his First Amendment rights when he was dismissed.

Lastly, by alleging that the termination was motivated by the exercise of the petition privilege, Leese has adequately alleged that his challenge to the hiring process was a motivating factor in the appellees' decision to dismiss him. Thus, he has set forth facts to state a cause of action for violations of the First and Fourteenth Amendments. And by charging that his retaliatory discharge was effected by application of county laws and regulations, he has charged a violation of § 1983. See footnote 8. If Leese can prove these facts at trial, the burden will shift to the appellees to show that the appellant would have been dismissed, regardless of his exercise of the petition privilege, DiGrazia, 288 Md. at 448, 418 A.2d 1191, as well as to show any justifying work-place factor.

III. Abusive Discharge

In addition to his constitutional challenges, Leese also asserts that his firing amounted to an abusive discharge under Maryland's[***32] common law. Specifically, his cause of action for abusive discharge "is grounded and based upon a breach of contractual rights and duties owed to him by the [appellees]." Recent decisions indicate that [HN20] a claim for abusive discharge must allege that

- [*468] 1. the employee was discharged;
- 2. the dismissal violated some clear mandate of public policy; and
- 3. there is a nexus between the defendants and the decision to fire the employee.

Moniodis v. Cook, 64 Md.App. 1, 13-14, 494 A.2d 212 (1985). See also Staggs v. Blue Cross of Maryland, Inc., 61 Md. App. 381, 486 A.2d 798 (discussing the element of discharge), cert. denied, 303 Md. 295, 493 A.2d 349 (1985). Absent any one of these elements, "an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time." Adler, 291 Md. at 35, 432 A.2d 464.

It is clear to us that the appellant has properly pleaded the first two elements. There is no doubt that he was in fact discharged. Moreover, to the extent that this discharge violated Leese's constitutional rights, it was abusive. We can conceive of no clearer "mandate of public policy" than [***33]the rights spelled out in the United States Constitution. See Moniodis, 64 Md.App. at 10, 494 A.2d 212.

It is considerably less apparent that all the appellees were somehow involved in the decision to fire Leese. Indeed, it is only alleged that Fagan made the decision to terminate him, and it was [**173] Fagan who signed the termination letter. Nevertheless, the amended declaration alleged that all the individual appellees, as well as the county, participated in the discharge. Whether this can be proved, particularly as to Yerman, Fortner, and Albinok, may be questioned. See Moniodis, 64 Md.App. at 14, 494 A.2d 212. But we are dealing here with pleading, not proof. The amended declaration was sufficient to charge abusive discharge against all the appellees.

IV. Intentional Infliction of Emotional Distress

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

In the last count of his amended declaration, the appellant asserted that the appellees "intentionally conspired together" to deny him the merit position and to [*469] terminate his employment. n12 This, he asserts, was without just cause and "for the express purpose of humiliating, embarrassing and causing [the appellant] to endure and experience[***34] severe emotional distress and emotional suffering." [HN21] To state a cause of action for intentional infliction of emotional distress, the appellant's amended declaration must have alleged the following four elements:

- (1) The conduct must be intentional or reckless;
- (2) The conduct must be extreme and outrageous;
- (3) There must be a causal connection between the wrongful conduct and the emotional distress;
- (4) The emotional distress must be severe.

Moniodis, 64 Md.App. at 15, 494 A.2d 212. We believe that the appellant has failed to allege facts which, if proven, would establish the second and fourth elements.

-----Footnotes-----

n12. In making this general allegation, the appellant may be attempting to plead this count under 42 U.S.C. § 1985 (1982). This effort is misplaced. While § 1985(2) has been deemed to apply to cases involving employees who were discharged in retaliation for seeking judicial redress against their employers, *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir.1983), it does not apply to instances where employees have pursued administrative, rather than judicial, redress. See *Hack v. Oxford Health Care, Inc.*, 562 F.Supp. 295, 299 (N.D.Ind.1983). Nor does this case fall within § 1985(3). Plainly, the appellant has not alleged that the conspiracy was motivated by an animus that would bring this case under that subsection. See *Carpenters v. Scott*, 463 U.S. 825, 837-39, 103 S.Ct. 3352, 3360-61, 77 L.Ed.2d 1049 (1983); *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir.1985); *Mears v. Oxford*, 762 F.2d 368, 374 (4th Cir.1985); *Munson v. Friske*, 754 F.2d 683, 694-96 (7th Cir.1985).

-----End Footnotes-----

[***35]

A. Extreme and Outrageous Behavior

[HN22] "In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred." *Harris v. Jones*, 281 Md. 560, 568, 380 A.2d 611 (1977). In *Dick v. Mercantile-Safe Deposit & Trust*, 63 Md.App. 270, 492 A.2d 674 (1985), we recently reviewed what is meant by "extreme and outrageous conduct." There, we determined that it exists "only if 'the average member of the community [*470] must regard the defendant's conduct . . . as being a complete denial of the plaintiff's dignity as a person.'" *Id.* at 276, 492 A.2d 674 (quoting *Alsteen v. Gehl*, 21 Wis.2d 349, 124 N.W.2d 312, 318 (1963)). In *Moniodis*, we had occasion to apply these principles to an alleged abusive discharge. Writing for the court, Judge Weant began his discussion of the issue by noting that "[t]he actors in this case were an employer and a supervisor, and as such their conduct must be 'carefully scrutinized.'" 64 Md.App. at 17, 494 A.2d 212 (quoting *Harris*, 281 Md. at 569, 380 A.2d 611). The other factors that were deemed important in generating a prima facie case on the[***36] extreme and outrageous issue were that the employers were aware of the employee's sensitive nature, that the charges against her suggested that she was dishonest and that forcing the employee to undergo a lie detector test was in direct violation of her statutory right to refuse to take such a test. *Id.* at 13, 494 A.2d 212.

[**174] In *Beye v. Bureau of National Affairs*, 59 Md.App. 642, 477 A.2d 1197, cert. denied, 301 Md. 639, 484 A.2d 274 (1984), we held that the following employer excesses did not amount to extreme and outrageous conduct:

- (1) for six years, from 1976-1982, Thomas and Shaw gave him poor performance ratings, 'threatened to fire him, harassed him and physically assaulted him';
- (2) BNA passed him over for promotion in favor of employees with less

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

seniority and appointed Thomas as his supervisor with knowledge of Thomas's 'prior illegal activity and the efforts of . . . Beyé to ferret it out and to have it prosecuted'; and (3) Moore deceived him into resigning.

59 Md.App. at 656, 477 A.2d 1197. See also *Continental Casualty v. Mirabile*, 52 Md.App. 387, 449 A.2d 1176, cert. denied, 294 Md. 652 (1982) (employer who screamed at [***37] employee and moved him from desk to desk held not to have acted in an extreme and outrageous manner).

Here, it is alleged that the appellees were employers and that they acted intentionally. This resembles the situations [*471] in *Moniodis* and *Beyé*. What is missing, however, is an allegation that the appellant was overly sensitive to the treatment he received. Nor is it suggested that he was labeled as dishonest or immoral. By denying him a promotion and firing him, the appellees may have acted with a disregard for Leese's emotional well being, but we cannot say that these actions standing alone amount to the "major outrage" of personal dignity that is "essential to the tort." *Continental Casualty*, 52 Md.App. at 404, 449 A.2d 1176 (quoting *Restatement (Second) of Torts* § 46, comment 5 (1967)).

B. Severity of Emotional Distress

Even if we were to find that the conduct alleged was extreme and outrageous, the amended declaration clearly failed to allege that "the emotional distress [was] severe." *Moniodis*, 64 Md.App. at 15, 494 A.2d 212. [HN23] To meet this standard, Leese would have had to allege in effect that he suffered "a severely disabling emotional [***38] response,' so acute that 'no reasonable man could be expected to endure it.'" *Id.* (quoting *Harris*, 281 Md. at 571, 380 A.2d 611 [emphasis in original]). In *Moniodis* Judge Weant also addressed this element in the context of employees who were discharged for refusing to take a lie detector test. Concluding that some of the discharged employees had not suffered sufficiently disabling emotional distress, he noted that they were "quite capable of tending to necessary matters." *Id.* 64 Md.App. at 16, 494 A.2d 212. With regard to one employee, in contrast, he concluded that a sufficiently serious emotional response had been shown.

It appears that Cook took her duties at Rite-Aid quite seriously. When [her supervisor] told her she would be transferred, her hours diminished, and her store keys taken, she was deeply disturbed. Her husband found her at home crying and wringing her hands. There was evidence that she did suffer from a pre-existing nervous condition; her emotional state, however, deteriorated significantly after her termination. She took greater [*472] amounts of medication and began to sleep most of the time. She became a recluse, her husband [***39] testified, and did not 'come out of it' for a year. Relatives came to the home to tend to household chores which Ms. Cook could no longer perform. She took pains to avoid contact with neighbors who might ask her why she no longer worked at Rite-Aid.

Id.

Leese's alleged injuries come nowhere near the type of severe emotional distress described above. His amended declaration alleges that he suffered "physical pain, emotional suffering and great mental anguish." This falls short of the "evidentiary particulars" that must be pleaded to show a *prima facie* case of severe injury. *Harris*, 281 Md. at 572. Moreover, it is never alleged that he was unable to tend to necessary matters. Indeed, [**175] in several counts he alleges that he has been actively job hunting. Thus, we must conclude that he has not alleged a sufficiently disabling emotional distress to state a cause of action for intentional infliction of emotional distress.

V. Defamation

A. Sufficiency of Allegations as to Defamation

[HN24]

For a complaint alleging libel to withstand the test of a [motion to dismiss] it must allege:

(1) a false and defamatory communication

a [***40] -- which the maker knows is false and knows it defames the other, or

b -- that the maker has acted in reckless disregard of these matters, or

64 Md. App. 442, *, 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

c -- that the maker has acted negligently in failing to ascertain them, and

(2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, [*473] or the explicit extrinsic facts and innuendo which make the statement defamatory, and

(3) allegations of damages with some particularity, since Gertz [v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)] and Jacron [Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976)] forbid presumed damages.

Metromedia, Inc. v. Hillman, 285 Md. 161, 172, 400 A.2d 1117 (1979).

In counts VI and IX of his declaration Leese alleged that appellees placed in his personnel file statements that he "has not demonstrated ability to assume a professional management role beyond daily operations" and that "due to the employees [sic] work history, the level and scope of positions for which he is eligible are restricted." Leese further alleged that these statements were untrue, that[***41] appellees knew of their falsity and defamatory character, and that they were disseminated to the Department of Aging staff and "with reckless disregard of this knowledge" to prospective employers. According to the declaration, Leese sustained damage "by being rejected for other positions with the [county] as well as not being employed for over a year by any other employer, after said statements became known to said prospective employer." These allegations meet the Metromedia standards.

Although publication could have been charged with more clarity, it was sufficiently alleged. So were damages and the known falseness of the statements. The only substantial question pertains to the defamatory nature of the statements.

[HN25] A statement is defamatory if it exposes "the person [who is the subject of it] to public scorn, hatred, contempt or ridicule and thus injure[s] reputation." *Mareck v. Johns Hopkins University*, 60 Md.App. 217, 223, 482 A.2d 17 (1984) (quoting *Thompson v. Upton*, 218 Md. 433, 437, 146 A.2d 880 (1958), cert. denied, 302 Md. 288, 487 A.2d 292 (1985)). A written statement is libel per se when "the words [*474] themselves impute the defamatory[***42] character." *Metromedia*, 285 Md. at 172, 400 A.2d 1117. And it is defamatory "to utter any slander or false tale of another . . . which may impair or hurt his trade or livelihood." 3 W. Blackstone, *Commentaries on the Laws of England* 123 (special ed. 1983). Thus, a statement "that adversely affects [an employee's] fitness for the proper conduct of his business . . . [is] actionable per se at common law." *Hearst Corp. v. Hughes*, 297 Md. 112, 118, 466 A.2d 486 (1983).

This is not to imply, however, that every negative evaluation of an employee's performance is potentially defamatory. Rather, [HN26] "[t]he words must go so far as to impute to him some incapacity or lack of due qualification to fill the position." *Foley v. Hoffman*, 188 Md. 273, 284, 52 A.2d 476 (1947) (quoting *Kilgour v. Evening Star Co.*, 96 Md. 16, 24-25, 53 A. 716 (1902) quoting *Sillars v. Collier*, 151 Mass. 50, 23 [*176] N.E. 723 (1890)). See also *Bowie v. Evening News*, 148 Md. 569, 577, 129 A. 797 (1925) (implying that employee lacks honesty); *Flaks v. Clark*, 143 Md. 377, 122 A. 383 (1923) (had it been alleged that "he managed his said business improperly," it would have [***43] been defamatory). In other words, the defamatory statement must be such that "if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed." *Kilgour v. Evening Star Co.*, 96 Md. 16, 29, 53 A. 716 (1902).

Taken in the abstract, neither the statement that Leese had failed to demonstrate ability to assume a professional management role nor the statement that his work history restricted the scope and level of possible future positions was defamatory per se. [HN27] A statement that one has failed to demonstrate ability to assume a professional management role does not in and of itself charge lack of that ability. If the employment in question were of short duration, it might not impute any lack of qualification, but simply a need for more time on the job to develop the requisite ability. And if the job did not in fact involve a [*475] professional management role it might not be derogatory at all. Similarly, the second statement, in and of itself, might have no adverse connotation. For example, if the work history were one of part-time employment at the employee's own request, there would be nothing defamatory[***44] about a comment that such a work history limited the scope of possible future hiring. We must, therefore, look for other allegations in the amended declaration in the context of which the statements might be deemed defamatory. In other words, we must look for innuendo that would establish libel per quod.

In the declaration Leese claimed he was employed by the county for some six years "to plan, develop and implement a transportation Program for Baltimore County's senior citizens," that he directed the program from its inception, that his

employment was in the nature of "professional management" and that "he provided professional management satisfactory to the [county] for six years." If one who has performed professional management services for six years is denied a position because he has failed to demonstrate ability to assume a professional management role, that statement clearly indicates lack of that ability and thus substantially impairs the would-be manager's professional reputation. If that same employee is then discharged with the notation that "the level and scope of positions for which he is qualified are limited" there is an equally damaging effect. The two statements[***45] become very like the "[t]his termination is for unsatisfactory performance" that was held defamatory in *Adler v. American Standard Corp.*, 538 F.Supp. 572, 577 (D.Md.1982). Since publication, falsity, and damages were adequately charged, we hold that the amended declaration sufficiently set forth a cause of action in libel per quod.

B. Privilege

Appellees argue that, even so, they are protected by a conditional privilege. While the existence of such a privilege is ordinarily a matter of defense, if a defamation [*476] complaint shows on its face the existence of a privilege, the issue may be raised by motion to dismiss.

As we pointed out in *Happy 40, Inc. v. Miller*, 63 Md.App. 24, 31-32, 491 A.2d 1210 (1985), [HN28] a defamatory statement dealing with reasons for an employee's discharge may be privileged if communicated to fellow-employees or to a recipient (such as a prospective new employer) "who justifiably is entitled to receive it." The publications alleged by Leese were of precisely this sort. But the conditional privilege may be lost if it is abused. *Id.* at 32-33, 491 A.2d 1210. Abuse occurs when the statement is made with 1) a reckless disregard for [***46]its truth, 2) it is not made in furtherance of the interest for which the privilege exists, or 3) it is communicated to a third person other than one "whose hearing is reasonably believed to be necessary [*177] or useful to the protection of the interest." *Id.* at 32, 491 A.2d 1210 (quoting *Mareck*, 60 Md.App. at 225, 482 A.2d 17). In this case, the appellant has placed the first form of abuse in issue. He did this by alleging that appellees "knew the statements to be false." *Adler*, 538 F.Supp. at 577. While the existence of a privilege is an issue of law, its forfeiture by abuse is an issue of fact. *Happy 40, Inc.*, 63 Md.App. at 34, 491 A.2d 1210. Thus, we hold that the appellant has sufficiently alleged all the elements of defamation. He has also properly pleaded that the appellees forfeited their qualified privilege as employers.

VI. Immunities

Akin to their qualified privilege argument is a more broad-ranging contention appellees make with respect to Leese's constitutional and common law claims. They assert these claims are barred by various immunities, specifically, governmental immunity, public official immunity, and immunity under 42 U.S.C. § 1983.[***47] [HN29] As in the case of qualified privilege in a defamation claim, these immunities are generally matters of defense. See *Tanner v. Hardy*, 764 F.2d 1024 (4th Cir.1985) (§ 1983 "good faith" immunity). But, again as in the case of qualified privilege, if a complaint [*477] shows the potential existence of an immunity on its face, that defense is available on motion to dismiss. Since Leese's amended declaration did so, we address each of the claimed immunities in turn.

A. Governmental Immunity

Imported into this country from English common law, [HN30] the doctrine of sovereign immunity has survived repeated challenges over the years and remains as a formidable obstacle to those who attempt to sue a governmental entity. See, e.g., *Austin v. Baltimore*, 286 Md. 51, 54-58, 405 A.2d 255 (1979). n13 Not all governmental entities, however, are treated equally. Although the State's former near-complete immunity from all suits in tort and contract has been substantially eroded by statute, State Govt. Art. §§ 12-101 -- 12-204, municipalities and counties have been traditionally cloaked with a more limited immunity, also (at least in contract) somewhat modified by statute. Since this [***48]case involves a suit against a county, the latter must be examined in some depth.

-----Footnotes-----

n13. For a historical sketch of the origins and history of sovereign immunity and the policies supporting it, see *Godwin v. County Commissioners of St. Mary's County*, 256 Md. 326, 330-34, 260 A.2d 295 (1970).

-----End Footnotes-----

[HN31] Under Maryland common law "[u]nlike the total immunity from tort liability which the State and its agencies possesses, the immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a 'governmental' rather than a 'proprietary' function." Austin, 286 Md. at 53, 405 A.2d 255. By its terms this standard applies only in tort actions.

Where a county is attempting to assert governmental immunity as a bar to a contract claim, the common law allows it to "abrogate its responsibility under a contract entered into in performance of a governmental function if dictated by the public good." *American Structures, Inc. v. Baltimore*, 278 Md. 356, 359, 364 A.2d 55[***49] (1976). This is not to suggest that counties and municipalities are fully [*478] immunized against contractual liability. Rather, they are "answerable in damages incurred to the time of cancellation." *Id.*

This common law contract immunity, however, is limited by statute. [HN32] Under § 1A, Article 25A, Annotated Code of Maryland, "a chartered county . . . may not raise the defense of sovereign immunity . . . in an action in contract based upon a written contract executed on behalf of the county or its department, agency, board, commission or unit by an official or employee acting within the scope of his authority." Md.Code Ann. Art. 25A, § 1A(a) (1984 Supp.). See also Md.State Gov't Art. § 12-202 (1984); Md.Code Ann. Art. 25, § 1A (1984 Supp.).

[**178] In sum, before governmental immunity can be asserted in either a contract or tort claim, it must appear that the county committed the infraction while it was engaged in a governmental function. And, in a contract case, the bar only applies to damages incurred after the breach of a contract that does not fall within § 1A. With these principles in mind, we turn to Leese's tort and contract claims.

His amended declaration[***50] alleged improprieties in the county's hiring and firing processes. These plainly are governmental functions. See *Tadger v. Montgomery County*, 300 Md. 539, 546-50, 479 A.2d 1321 (1984). Thus, the common law claims based on the county's alleged tortious conduct are barred by governmental immunity. As counsel conceded at oral argument, this effectively disposes of the defamation and emotional distress claims against the county.

With regard to abusive discharge, Leese has elected to assert this claim against the county in contract, not in tort. See *Adler*, 291 Md. at 36, 432 A.2d 464, and *Moniodis*, 64 Md.App. at 13, 494 A.2d 212. We note at the outset that his amended declaration speaks only of losses incurred after he was discharged. Thus, he has alleged only damages against which the county is immunized. See *Rittenhouse v. Baltimore*, 25 Md. 336, 349 (1866). His [*479] attempted reliance upon Section 1A to avoid sovereign immunity is misplaced. [HN33] By its terms, Section 1A requires a "written contract" that was "executed on behalf of the county." A failure to meet either of these requirements nullifies the operation of the section. See *Mass Transit Admin. v. Granite Constr.*, 57 Md.App. 766, 780, 471 A.2d 1121 (1984). Invoking our decision in *Staggs v. Blue Cross of Maryland*, 61 Md.App. 381, 486 A.2d 798 (1985), Leese asserts that the county code and regulations qualify as a written contract. Next, borrowing from *Dep't of Gen. Serv. v. Cherry Hill Sand and Gravel Co.*, 51 Md.App. 299, 443 A.2d 628 (1982), Leese attempts to supplement the written statutory contract with oral understandings between him and the appellees. Although this imaginative argument may have some facial validity, it addresses only one of the two requirements of Section 1A. It does not address the need for an executed contract. The appellant does not suggest that his contract with the appellees was ever executed. In any case, his allegations as to an implied or oral contract are factually insufficient. Hence, his effort to mold this case to Section 1A must fail.

In short as pleaded, neither his common law tort nor contract claims are assertable against the county.

B. Official Immunity

[HN34] While governmental immunity immunizes political subdivisions against the torts committed by their employees, it does not offer the same protection to all the employees[***52] who commit the alleged wrongs. *Duncan v. Koustenis*, 260 Md. 98, 104, 271 A.2d 547 (1970). To guard against the hardship that this exposure to liability would place on certain public servants, the courts have fashioned the doctrine of public official immunity. This doctrine, however, only becomes an issue when

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

- 1) The public servant is a 'public official';
- 2) the alleged culpable conduct was committed by him while acting in a discretionary capacity; and
- 3) the official acted without actual malice.

[*480] *Bradshaw v. Prince George's County*, 284 Md. 294, 302-03, 396 A.2d 255 (1979); *Robinson v. Bd. of County Commissioners*, 262 Md. 342, 346-47, 278 A.2d 71 (1971); *Arrington v. Moore*, 31 Md.App. 448, 464, 358 A.2d 909, cert. denied, 278 Md. 729 (1976).

Leese's amended declaration alleges facts sufficient to establish the second element of official immunity. Clearly, when the appellees wronged the appellant, they did so while exercising their discretionary capacities to evaluate job applicants and to hire and fire employees. Moreover, it is undisputed that all the alleged culpable [**179] conduct occurred while the supervisory employees[***53] were on the job. See *Arrington*, 31 Md.App. at 456-59, 358 A.2d 909.

We turn next to the third element. [HN35] The actual malice needed to defeat official immunity requires "an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and wilfully injure the plaintiff." *Arrington*, 31 Md.App. at 464, 358 A.2d 909 (quoting *H & R Block, Inc. v. Testerman*, 275 Md. 36, 43, 338 A.2d 48 (1975)). In this case, the appellant has alleged that the appellees tortiously injured him "for personal reasons and with bias and prejudice against" him. The declaration further alleges that they "were prompted to fire and terminate [appellant's] employment for improper and illegal motives which were contrary to the public policy of the state" and that this discharge "was motivated by retaliation for exercising his legal rights to appeal."

Actual malice does not always have to be shown with specificity; it can be inferred. *Henderson v. Maryland Nat'l Bank*, 278 Md. 514, 523, 366 A.2d 1 (1976). In *Henderson*, for example, the Court of Appeals ruled that actual malice could be inferred from a bank's having bickered[***54] with a customer for a period preceding its breach of a contract. The instant case is similar to *Henderson* in that it contains an alleged personality conflict between Leese and some supervisory employees. Thus, it is inferrable [*481] from the well-pleaded facts that the appellees acted out of spite and hatred when they denied Leese the position, dismissed him and tortiously injured him.

These allegations, if proved, would be sufficient to negate the third public official immunity factor. Since all three factors must exist to establish immunity, the amended declaration prevented the successful assertion of that immunity by way of motion to dismiss. Thus, we need not decide whether the allegations showed that the individual appellees were "public officials" as that term is used in the immunity context.

C. Immunity Under 42 U.S.C. § 1983

Although the common law immunities discussed thus far address the appellant's tort and contract claims, they do not govern the resolution of the alleged constitutional infractions which comprise the bulk of this case. Immunities to suit under 42 U.S.C. § 1983 have been frequently litigated. See, e.g., *Harlow v. Fitzgerald*, [***55] 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Out of this litigation, two hard and fast rules have emerged. First, [HN36] municipalities and counties are not immune from suit. *Owen*, 445 U.S. at 638, 100 S.Ct. at 1409. Appellee Baltimore County, therefore, has no immunity from Leese's § 1983 claims. Second, based on statutory construction and policy reasons, certain official immunities long-recognized at common law have been deemed to apply in § 1983 cases. See *Wood*, 420 U.S. at 315-22, 95 S.Ct. at 997-1001.

From the standpoint of statutory construction, the notion that public officials should be accorded some form of immunity was viewed as being so deeply rooted in the common law that Congress's failure to negate it indicates that it [*482] survived the adoption of § 1983. n14 See, e.g., *Pierson v. Ray*, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1217-18, [***56] 18 L.Ed.2d 288 (1967). [HN37] The policies supporting the extension of official immunity have been justified

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

"on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of [**180] subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to exercise his office with the decisions and public judgment required by the public good." Scheur, 416 U.S. at 240, 94 S.Ct. at 1688. Furthermore, "the threat of personal liability might deter citizens from holding public office." Owen, 445 U.S. at 654 n. 38, 100 S.Ct. at 1417 n. 38.

-----Footnotes-----

n14. These common law immunities, as preserved under 42 U.S.C. § 1983, would apply with equal force to common law actions for violations of constitutional rights.

-----End Footnotes-----

Although these policy considerations are important, they must be balanced against the interests of private citizens whose constitutional rights have been [***57] intruded upon by the errant official. Butz v. Economou, 438 U.S. 478, 503-08, 98 S.Ct. 2894, 2909-11, 57 L.Ed.2d 895 (1978). In recognition of these competing interests, [HN38] the Court has recognized absolute and qualified immunities. Absolute immunity shields these "officials whose special functions or constitutional status requires complete protection from suit." Harlow, 457 U.S. at 807, 102 S.Ct. at 2732. See also Imbler v. Pachtman, 424 U.S. 409, 421-24, 96 S.Ct. 984, 990-92, 47 L.Ed.2d 128 (1976) (explaining policies behind absolute immunity). As an example, the Harlow court compiled the following list of officials cloaked with absolute immunity:

legislators, in their legislative functions, see, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 [95 S.Ct. 1813, 44 L.Ed.2d 324] (1975), and of judges, in their judicial functions, see, e.g. Stump v. Sparkman, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978), now is well settled. Our decisions also have extended absolute [*483] immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see Butz v. Economou, 438 U.S. 478, 508-512 [***58] [98 S.Ct. 2894, 2911-2916, 57 L.Ed.2d 895] (1978), executive officers engaged in adjudicative functions, id., at 513-517 [98 S.Ct. at 2914-2916], and the President of the United States, see Nixon v. Fitzgerald, ante, [457 U.S.] p. 731 [102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)].

457 U.S. at 807, 102 S.Ct. at 2732.

Clearly, none of the individual appellees in this suit even approach the level of status that would merit absolute immunity. Rather, they warrant at most the qualified immunity accorded all other public employees. See Procunier, 434 U.S. at 561-66, 98 S.Ct. at 859-62. In Harlow the court explained the scope of this immunity:

[HN39]

Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. [citation omitted]. Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' [citation omitted]. The subjective component refers to 'permissible intentions.' [citation omitted]. Characteristically the Court has defined [***59] these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury' [citation omitted].

457 U.S. at 815, 102 S.Ct. at 2736 [emphasis in original].

[HN40] With regard to a knowing violation of a constitutional right, the essential focus is whether the law existing at [*484] the time of the alleged violation proscribed what occurred. Procunier, 434 U.S. at 562, 98 S.Ct. at 859. "[A]n official has, of course, no duty to anticipate unforeseeable constitutional developments." O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 2495, 45 L.Ed.2d 396 (1975). When [**181] the law is settled, however, it is difficult for

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

the official to argue his ignorance of it because the law charges a reasonably competent[***60] official with knowing the law governing his conduct. Harlow, 457 U.S. at 818-19, 102 S.Ct. at 2738-39.

In this case we have already determined that Leese has sufficiently alleged that he was fired in retaliation for exercising his First Amendment right to petition government for redress of grievances. On October 7, 1982, Leese was unofficially notified that his employment with the county would come to an end on October 22, 1982. In January of that year, the Court of Appeals decided *DeBleeker v. Montgomery County*, 292 Md. 498, 438 A.2d 1348 (1982), a case that declared firing an employee for exercising his First Amendment rights to be unconstitutional. In doing so, the Court of Appeals cited *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) and *DiGrazia v. County Executive for Montgomery County*, 288 Md. 437, 418 A.2d 1191 (1980). From this we conclude that the constitutional proscription on such retaliatory dismissal was well-established when the decision to dismiss Leese was made. Thus, no immunity from § 1983 exists here.

Turning to the second instance when immunity from § 1983 does not exist, it is apparent that, [HN41] rather than the actual[***61] malice standard required under Maryland's official immunity law, the federal § 1983 counterpart can be satisfied by either actual malice or its legal equivalent. The latter includes a reckless disregard for the injured party's rights. *Procunier*, 434 U.S. at 562, 98 S.Ct. at 859. To meet the burden of pleading malice, the appellant's amended declaration must contain more than his legal conclusion on the issue. For the reasons stated in our discussion of the immunity under state law, we conclude that actual [*485] malice was alleged here. Leese in substance claimed he was deliberately discharged in retaliation for exercise of his First Amendment rights. Thus, in the context of the motion to dismiss, Leese's § 1983 claim is not barred by official immunity as a matter of law.

VII. Punitive Damages

Among appellees' many objections to Leese's amended declaration was one going to the propriety of punitive damages claimed against the individual appellees in count VII (denial of Fourteenth Amendment due process in hiring), count VIII (firing in retaliation for exercise of First Amendment rights -- abusive discharge), and count IX (defamation) and against all the appellees[***62] in count X (violation of § 1983) and count XI (intentional infliction of emotional distress). Since we have held that the amended declaration failed to state a cause of action under counts VII and XI, we need not consider them further.

As to the abusive discharge counts against the individuals, assuming Leese's allegations are supported by proof and liability is established (thereby rejecting whatever defenses the individuals assert) punitive damages are recoverable if Leese shows actual malice. [HN42] The abusive discharge claim against the individuals, unlike the similar claim against the county, is framed as a tort claim. The tort, however, is one arising out of contract, thus requiring proof of actual malice as a prerequisite to the recovery of punitive damages. See *Miller Building Supply v. Rosen*, 61 Md. App. 187, 485 A.2d 1023, cert. granted, 303 Md. 43, 491 A.2d 1197 (1985); *Adler*, 538 F.Supp. at 580. As to the defamation claim, if liability is established under it, punitive damages are recoverable. So far as the § 1983 claim is concerned, even if liability under it is demonstrated by proof, the county is not subject to punitive damages. *Newport v. Fact Concerts, Inc.*, [***63] 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The contrary is true as to the individual appellees. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).

[*486] SUMMARY

The trial court did not err in dismissing Leese's claim for denial of due process in [**182] connection with his non-hiring and his discharge (except to the extent those claims are based on a liberty interest infringed upon by the retaliatory discharge), the common law infliction of emotional distress claim, the common law abusive discharge claim against the county, and the common law defamation claim against the county.

On the other hand, the court did err in dismissing the First and Fourteenth Amendment claims asserting, against the county and the individual appellees, discharge in retaliation for exercise of constitutional rights, the similar § 1983 claims against all appellees, the abusive discharge claim against the individual appellees, and the defamation claims against the individual appellees. The case must be remanded for further proceedings as to those claims, subject to whatever proof Leese may produce and whatever defenses the appellees may successfully establish. [***64]

64 Md. App. 442, *; 497 A.2d 159, **;
1985 Md. App. LEXIS 469, ***

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COST TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEES.

Bryan LITTLE, Plaintiff-Appellant, v. UNITED TECHNOLOGIES, CARRIER TRANSICOLD DIVISION, Defendant,
Carrier Corporation, Defendant-Appellee.
No. 95-8425

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

103 F.3d 956; 1997 U.S. App. LEXIS 930; 72 Fair Empl. Prac. Cas. (BNA) 1560; 69 Empl. Prac. Dec. (CCH) P44,485;
10 Fla. L. Weekly Fed. C 660

January 22, 1997, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Georgia. No. CA93-41-14th(Df). Duross Fitzpatrick, Chief Judge.

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee sought review of the order from the United States District Court for the Middle District of Georgia, which granted summary judgment in favor of defendant, employer, in plaintiff's action that alleged employer retaliated against him for his opposition to race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-3(a).

OVERVIEW: Plaintiff employee, a white male, worked for defendant employer. He heard another employee use a racially derogatory term. Plaintiff brought an action against employer alleging that employer had retaliated against him because of his opposition to the tolerance of racial slurs at the company, in violation of Title VII, 42 U.S.C.S. § 2000e-3(a), the Civil Rights Act of 1991, and 42 U.S.C.S. § 1981. The district court granted summary judgment in favor of employer after finding that plaintiff had failed to establish a prima facie case of discrimination. On review, the court found that by the terms of the statute not every act by an employee in opposition to racial discrimination was protected. The court held that in order to be protected the opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual. The court found that the employer did not know and should not have known of the act of discrimination, a necessary finding in order to establish a prima facie case under the statute. Accordingly, the court affirmed the holding of the district court.

OUTCOME: The court affirmed the order of the lower court that granted summary judgment in favor of defendant employer, in an action alleging that defendant retaliated against plaintiff employee for his opposition to race discrimination. The court held that plaintiff failed to establish a prima facie case of retaliation by defendant under the applicable law.

CORE TERMS: unlawful employment practice, prima facie case, co-worker, retaliation, team, derogatory, racially, objectively reasonable, supervisor, summary judgment, offensive, opposing, granting summary judgment, racial discrimination, reasonably believed, statutorily, uttered, Civil Rights Act, retaliatory discharge, protected activity, protected conduct, reasonable belief, nonmoving party, remedial action, matter of law, per curiam, discriminated, retaliatory, harassment, racial slur

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN1] The appeals court reviews de novo the district court's order granting summary judgment. Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. On a motion for

103 F.3d 956, *; 1997 U.S. App. LEXIS 930, **;
72 Fair Empl. Prac. Cas. (BNA) 1560; 69 Empl. Prac. Dec. (CCH) P44,485

summary judgment, the court must review the record, and all its inferences, in the light most favorable to the nonmoving party.

Labor & Employment Law: Discrimination: Retaliation

[HN2] Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.S. § 2000e-3(a). As with a discriminatory treatment claim, a plaintiff alleging a retaliation claim under Title VII must begin by establishing a prima facie case; the plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the plaintiff's protected activities.

Labor & Employment Law: Discrimination: Title VII

[HN3] In order to hold an employer responsible under Title VII, 42 U.S.C.S. § 2000e-3(a), for a hostile environment created by a supervisor or co-worker, a plaintiff must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Labor & Employment Law: Discrimination: Actionable Discrimination

[HN4] A plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII, 42 U.S.C.S. § 2000e-3(a), if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. A plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he subjectively that is, in good faith believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.

Labor & Employment Law: Discrimination: Actionable Discrimination

[HN5] A plaintiff, therefore, need not prove the underlying discriminatory conduct that he opposed was actually unlawful in order to establish a prima facie case and overcome a motion for summary judgment; such a requirement would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation of informal adjustment of grievances.

Constitutional Law: Civil Rights Enforcement: Private Discrimination

[HN6] See 42 U.S.C.S. § 1981.

Constitutional Law: Civil Rights Enforcement: Private Discrimination

[HN7] 42 U.S.C.S. § 1981 is concerned with racial discrimination in the making and enforcement of contracts.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Joseph C. Nelson, III, Nelson & Hill, Athens, GA.

ATTORNEY(S) FOR APPELLEE(S): Robert E. Rigrish, Atlanta, GA.

JUDGES: Before BIRCH, Circuit Judge, KRAVITCH, Senior Circuit Judge, and SCHWARZER, * Senior District Judge.

* Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

OPINIONBY: BIRCH

OPINION: [*958] BIRCH, Circuit Judge:

This appeal raises an issue of first impression in this circuit regarding a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), making it unlawful for an employer to retaliate against an employee for opposing a violation of Title VII: Is an employer's alleged retaliation against an employee for opposing an offensive or derogatory remark uttered by a co-worker actionable under Title VII? The district court granted summary judgment in favor of the employer on all claims. For the reasons that follow, we affirm.

I. BACKGROUND

Plaintiff-appellant, Bryan Little, is a white male who has worked for the defendant-appellee, Carrier Corporation ("Carrier") since 1987. In August, 1991, Little was assigned to work in Carrier's Test Department. Willie[**2] Wilmot, also a white employee, worked in the Quality Assurance Department. According to Little, several weeks after he began working in the Test Department, Wilmot approached him and stated: "Nobody runs this team but a bunch of niggers and I'm going to get rid of them." R1-28, Exh. F. Although Little apparently informed several co-workers about Wilmot's racially derogatory comment, he did not report the remark to either a supervisor or manager until approximately eight months later. In May, 1992, Little communicated the racial slur at a team meeting at which Wilmot was present. According to Little, the purpose of the meeting was to discuss Wilmot's continued membership on the team and, from Little's perspective, provided the appropriate forum to convey to other team members the statement Wilmot had made.

Following the meeting, Little's supervisor, Don Pursley, gave Little a "Record of Conversation" containing, in part, the following statement:

Repeating any racial slur is derogatory and offensive to some people. The use of such remarks whether said by another or not should not be used because it can cause friction between some members within a team. This may result in the [**3]team not being able to function in a team environment.

R1-28, Exh. D. Wilmot also received a similar document informing him that regardless of whether he had made the comment that gave rise to Little's accusation, Carrier would not tolerate racially offensive speech. Little contends that he was harassed continually from this point forward in retaliation for having complained about Wilmot's conduct. Specifically, he alleges that he was under constant surveillance from his supervisors, subjected to closer scrutiny and criticism, and occasionally given menial tasks to perform. n1

-----Footnotes-----

n1 In his complaint, Little also stated that he attended and spoke at a picnic in August, 1992, held to discuss the treatment of black employees at Carrier. Little alleged that Carrier further retaliated against him for his participation in that meeting by denying him a promotion. The denial of the promotion, however, is not argued as part of this appeal.

-----End Footnotes-----

In his amended complaint, Little alleged that Carrier had discriminated [**4]against him because of his opposition to the tolerance of racial slurs at the company, in violation of Title VII, the Civil Rights Act of 1991, and 42 U.S.C. § 1981. The district court granted summary judgment in favor of Carrier after finding that Little had failed to establish a [*959] prima facie case of discrimination. In reaching this conclusion, the court determined that (1) one isolated comment does not constitute an unlawful employment practice, and (2) Little had not been subjected to an adverse employment action within the meaning of Title VII.

II. DISCUSSION

[HN1] We review de novo the district court's order granting summary judgment. *Jameson v. Arrow*, 75 F.3d 1528, 1531 (11th Cir.1996). Summary judgment is appropriate where there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). On a motion for summary judgment, we must review the record, and all its inferences, in the

103 F.3d 956, *; 1997 U.S. App. LEXIS 930, **;
72 Fair Empl. Prac. Cas. (BNA) 1560; 69 Empl. Prac. Dec. (CCH) P44,485

light most favorable to the nonmoving[**5] party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962) (per curiam).

A. Title VII

[HN2] Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). As with a discriminatory treatment claim, a plaintiff alleging a retaliation claim under Title VII must begin by establishing a prima facie case; the plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the plaintiff's protected activities. *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1074 (11th Cir.1995) (per curiam).

Having reviewed the record, we conclude that Little has failed to establish the first element of his prima facie case alleging retaliatory discrimination; that is, he has failed to show that he engaged in a statutorily protected [**6]activity. We note, at the outset, that only the Ninth Circuit has addressed the question at issue before us: Whether the expression of opposition to a single comment by one co-worker to another can constitute opposition to an unlawful employment practice as a matter of law. In *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir.1978), the plaintiff objected to a racially derogatory remark uttered by a co-worker, demanded and received an apology from the same co-worker, and subsequently was fired. In finding that the plaintiff had failed to establish a prima facie case of retaliatory discharge under Title VII, the Ninth Circuit resolved that the opposition of an employee to a co-worker's own individual act of discrimination "does not fall within the protection of [Title VII]." *Id.* at 142.

We agree with the Ninth Circuit's disposition of *Silver*, a case factually similar to the one at hand. As stated by that court,

by the terms of the statute ... not every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual.

[**7] *Id.* at 141. We previously have held that [HN3] in order to hold an employer responsible under Title VII for a hostile environment created by a supervisor or co-worker, a plaintiff must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir.1996). See also *Silver*, 586 F.2d at 142 ("Even a continuing course of racial harassment by a co-employee cannot be imputed to the employer unless the latter both knows of it and fails to take remedial action.") Here, Little's opposition to the racial remark uttered by Wilmot, a co-worker, is protected conduct within the parameters of the statute only if Wilmot's conduct can be attributed to Carrier. Based on the facts of this case, we conclude that Wilmot's racially offensive comment alone is not attributable to Carrier and, accordingly, Little's opposition [*960] to the remark did not constitute opposition to an unlawful employment practice.

Little argues that even if Wilmot's comment, either in fact or in law, does not constitute an unlawful employment practice, he nonetheless can make out a prima facie case by showing that[**8] he reasonably believed that he was opposing a violation of Title VII by his employer. We previously have recognized that [HN4] a plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. See *Rollins v. State of Fla. Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir.1989). It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.

[HN5] A plaintiff, therefore, need not prove the underlying discriminatory conduct that he opposed was actually unlawful in order to establish a prima facie case and overcome[**9] a motion for summary judgment; such a

103 F.3d 956, *; 1997 U.S. App. LEXIS 930, **;
72 Fair Empl. Prac. Cas. (BNA) 1560; 69 Empl. Prac. Dec. (CCH) P44,485

requirement "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation of informal adjustment of grievances." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir.1978). See also *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A Sept. 1981), cert. denied, 455 U.S. 1000, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982) ("To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of [Title VII] if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices.") n2

-----Footnotes-----

n2 In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981).

-----End Footnotes-----

[**10]

In light of the facts of this case, however, we find Little's assertion that he reasonably believed Wilmot's comment to be a violation of Title VII by Carrier to be implausible at best. As noted above, Little never voiced his concern over Wilmot to a supervisor or management-level employee at Carrier and reported the comment for the first time in a team meeting held approximately eight months after the remark was made. The record indicates that no rational jury could find Little's belief that his opposition to Wilmot's racist remark constituted opposition to an unlawful employment practice to be objectively reasonable. As a result, although we acknowledge that a plaintiff conceivably could prevail on his retaliation claim notwithstanding the fact that the practice he opposed was not unlawful under Title VII, such a circumstance is not presented in this case. We conclude not only that Little's opposition to Wilmot's racially derogatory comment did not constitute opposition to an unlawful employment practice as a matter of law, but also that, based on the particularized facts of this case, Little did not have an objectively reasonable belief that he was opposing an unlawful employment[**11] practice.

B. 42 U.S.C. § 1981

In the complaint, Little alleged that the same facts that formed the basis of his Title VII retaliation claim also gave rise to a violation of [HN6] 42 U.S.C. § 1981. That statutory provision states, in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, liens, [*961] and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). In its order, the district court did not conduct a separate analysis of Little's Title VII and section 1981 claims and, in granting summary judgment in favor of Carrier, applied the same principles regarding the requisite elements of a prima facie case to both causes of action. Similarly, Little makes no legal distinction on appeal between his Title VII and section 1981 claims. It is worth noting, however, that Title VII's prohibition against retaliation for opposition to conduct[**12] reasonably believed to be violative of Title VII is not identical to the kind of discrimination proscribed by section 1981. It is well-established that [HN7] section 1981 is concerned with racial discrimination in the making and enforcement of contracts. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436, 88 S. Ct. 2186, 2201, 20 L. Ed. 2d 1189 (1968) ("In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law....").

Here, there is no evidence in the record--and Little does not suggest or allege--that the discrimination or retaliation allegedly levelled against him was due to his race; that is, Little does not contend that Carrier discriminated against him because he was white. Both the facts and legal framework of Little's action are grounded solely in the opposition clause

103 F.3d 956, *; 1997 U.S. App. LEXIS 930, **;
72 Fair Empl. Prac. Cas. (BNA) 1560; 69 Empl. Prac. Dec. (CCH) P44,485

of Title VII and are unrelated to the concerns explicitly set forth in the language of section 1981. [**13] Although we decide this issue based on reasoning not expressed by the district court, see *Church of Scientology v. Cazares*, 638 F.2d 1272, 1281 (5th Cir. Mar. 1981), we are convinced that the court properly determined that Little failed to establish a prima facie case with respect to his section 1981 claim.

III. CONCLUSION

In this appeal, Little contends that the district court erred in finding that he failed to establish a prima facie case of retaliatory conduct under Title VII and 42 U.S.C. § 1981 and granting summary judgment in favor of Carrier. We conclude that a racially derogatory remark by a co-worker, without more, does not constitute an unlawful employment practice under the opposition clause of Title VII, 42 U.S.C. § 2000e-3(a), and opposition to such a remark, consequently, is not statutorily protected conduct. We further resolve that, based on the record in this case, Little did not have an objectively reasonable belief that he opposed an unlawful employment practice and, therefore, failed to set forth a prima facie case under Title VII. Finally, with respect to Little's cause of action under 42 U.S.C. § 1981, we conclude that he failed to allege that the discrimination[**14] at issue was related to his race. Accordingly, we AFFIRM.

LUGAR v. EDMONDSON OIL CO., INC., ET AL.
No. 80-1730

SUPREME COURT OF THE UNITED STATES

457 U.S. 922; 102 S. Ct. 2744; 73 L. Ed. 2d 482; 1982 U.S.LEXIS 140

December 8, 1981, Argued
June 25, 1982, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 639 F.2d 1058, affirmed in part, reversed in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner debtor appealed from the order of the United States Court of Appeals for the Fourth Circuit that held that petitioner failed to state a claim for relief under 42 U.S.C.S. § 1983 on the basis that petitioner did not allege that respondent creditor acted under color of state law when respondent sought and received execution of a writ of attachment on petitioner's property that was later declared invalid for procedural defect.

OVERVIEW: Respondent creditor filed an action in state court and sought prejudgment attachment of petitioner debtor's property. The county sheriff executed a writ of attachment that effectively sequestered petitioner's property. The attachment was later dismissed on the basis that respondent did not establish the statutory grounds for attachment. Petitioner filed a 42 U.S.C.S. § 1983 action against respondent, alleging that it acted jointly with the state to deprive him of his property without due process of law. The district court held that no claim for relief under § 1983 was stated because respondent was not a state actor. The court of appeals affirmed on the ground that there was no allegation of conduct under color of state law. The court granted certiorari and reversed and remanded, holding that petitioner presented a valid claim under § 1983 that challenged the constitutionality of the state attachment statute because respondent acted jointly with the state in securing petitioner's property. The court held that because petitioner was deprived of his property through state action, respondent therefore acted under color of state law in participation of that deprivation.

OUTCOME: The court granted certiorari and reversed and remanded the order of the court of appeals which held that petitioner debtor did not state a claim for relief in a civil rights action against respondent creditor because respondent acted under color of state law in joint participation with the state to deprive petitioner of his property through the execution of a state writ of attachment.

CORE TERMS: state action, Fourteenth Amendment, color of state law, attachment, color of law, deprivation, color, private party, state law, prejudgment attachment, state actor, conspiracy, state-action, cause of action, presumptively, garnishment, private parties, custom, joint participation, state official, state statute, discriminatory, plainly, invoke, constitutional rights, jointly, deprive, under-color-of-state-law, joint action, misuse

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Procedural Due Process: Scope of Protection
[HN1] See U.S. Const. amend. XIV.

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

Constitutional Law: Procedural Due Process: Scope of Protection

[HN2] Because U.S. Const. amend. XIV is directed at the states, it can be violated only by conduct that may be fairly characterized as "state action."

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN3] 42 U.S.C.S. § 1983 provides a remedy for deprivations of rights secured by the constitution and laws of the United States when that deprivation takes place under color of any statute, ordinance, regulation, custom, or usage of any state or territory.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN4] In cases under 42 U.S.C.S. § 1983, under color of law has consistently been treated as the same thing as the state action required under U.S. Const. amend. XIV.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN5] In a 42 U.S.C.S. § 1983 action brought against a state official, the statutory requirement of action under color of state law and the state action requirement of U.S. Const. amend. XIV are identical.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN6] A private party's joint participation with a state official in a conspiracy to discriminate would constitute both state action essential to show a direct violation of petitioner's equal protection rights under U.S. Const. amend XIV and action under color of law for purposes of 42 U.S.C.S. § 1983.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Rem Actions

Constitutional Law: Procedural Due Process: Scope of Protection

[HN7] Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of a state act jointly with a creditor in securing the property in dispute.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN8] Private use of challenged state procedures, with the help of state officials, constitutes state action for purposes of U.S. Const. amend. XIV.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN9] Conduct allegedly causing the deprivation of a federal right can be fairly attributable to a state. A two-part approach exists in determining fair attribution. First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN10] The requirements that deprivation of property be caused by the exercise of a state right or privilege and that the party charged with the deprivation be a state actor collapse into each other when a claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the state to his decisions. The two principles diverge when the constitutional claim is directed against a party without such apparent authority, i. e., against a private party.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN11] While private misuse of a state statute does not describe conduct that can be attributed to the state, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 42 U.S.C.S. § 1983 action if the state actor requirement is met as well.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

[HN12] A private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a state actor for purposes of U.S. Const. amend. XIV.

DECISION: Complaint against private creditor's prejudgment attachment, held to state cause of action under 42 USCS 1983 where state statute authorizing it is alleged to be procedurally defective.

SUMMARY: A supplier of a lessee-operator of a truck stop indebted to the supplier sued on the debt in state court. Ancillary to that action and pursuant to state law, the supplier sought prejudgment attachment of certain of the operator's property. The prejudgment attachment procedure required only that the creditor allege, in an ex parte petition, a belief that the debtor was disposing of or might dispose of his property in order to defeat his creditors. Acting upon the petition, a clerk of the state court issued a writ of attachment, which was then executed by the county sheriff which effectively sequestered the debtor's property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because the creditor had failed to establish the statutory grounds for attachment alleged in the petition. The debtor subsequently brought an action under 42 USCS 1983 in the United States District Court for the Western District of Virginia against the creditor, alleging that in attaching his property the creditor had acted jointly with the state to deprive him of his property without due process of law. The District Court, construing the complaint as alleging a due process violation both from a misuse of the state procedure and from the statutory procedure itself, held that the alleged actions of the creditor did not constitute state action as required by the Fourteenth Amendment and that the complaint therefore did not state a claim upon which relief could be granted under 1983. The United States Court of Appeals for the Fourth Circuit affirmed, holding that a private party acts under color of state law within the meaning of 1983 only when there is a usurpation or corruption of official power by the private litigant or surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree (639 F2d 1058).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by White, J., joined by Brennan, Marshall, Blackmun, and Stevens JJ., it was held that (1) the constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute and if the challenged conduct of the creditor constitutes state action, then that conduct is also action under color of state law and would support a suit under 1983, and that (2) the allegation of the debtor that deprivation of his property resulted from the creditor's misuse or abuse of state law did not state a cause of action under 1983 but only challenged a private action, but the allegation that the deprivation of property resulted from a state statute that was procedurally defective under the due process clause stated a cause of action under 42 USCS 1983 since the statutory scheme was a product of state action, as a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment.

Burger, Ch. J., dissenting, expressed the view that the inquiry for dealing with suits under 1983 or suits brought pursuant to the Fourteenth Amendment is whether the claimed infringement of a federal right is fairly attributable to the state and, applying this standard, it cannot be said that the actions of the creditor here are fairly attributable to the state.

Powell, J., joined by Rehnquist and O'Connor, JJ., dissented, expressing the view that private "joint participants" with state officials do not themselves necessarily become state actors and, even when the inquiry is whether an action occurred under color of law, the "joint participation" standard is not satisfied when a private citizen does no more than provoke a presumptively valid judicial process in pursuit only of legitimate private ends.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

due process -- prejudgment attachment -- state action -- color of state law --

Headnote:

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

The constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute and if the challenged conduct of the creditor constitutes state action, then that conduct is also action under color of state law and will support a suit under 42 USCS 1983.

[***HN2]

prejudgment deprivation of property -- color of state law --

Headnote:

Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a claim under 42 USCS 1983.

[***HN3]

due process state action -- color of state law --

Headnote:

In an action under 42 USCS 1983 brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical.

[***HN4]

due process -- state action -- relationship to action under color of state law --

Headnote:

The two elements, state action and action under color of state law, denote two separate areas of inquiry since all conduct that satisfies the action under color of state law requirement of 42 USCS 1983 would not necessarily satisfy the Fourteenth Amendment requirement of state action, and since 1983 is applicable to other constitutional provisions and statutory provisions that contain no state action requirement, where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

[***HN5]

due process -- state action -- fair attribution of conduct to state --

Headnote:

As a matter of substantive constitutional law, the state action requirement of the Fourteenth Amendment reflects judicial recognition of the fact that most rights secured by the constitution are protected only against infringements by governments and, accordingly, the conduct allegedly causing deprivation of a federal right must fairly be attributable to the state; in determining the question of "fair attribution" a two-part approach is used, requiring that (1) the deprivation be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and (2) the party charged with the deprivation be a person who may fairly be said to be a state actor.

[***HN6]

statutory attachment procedures -- liability for due process violations -- stating cause of action --

Headnote:

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

An allegation by a debtor that a creditor's misuse or abuse of a state's garnishment and prejudgment attachment procedures deprived him of property without due process in violation of the Fourteenth Amendment fails to state a cause of action under 42 USCS 1983, the debtor only challenging private action, but an allegation by the debtor that the state statute deprived him of property without due process states a cause of action under 1983, the statutory scheme being a product of state action and the creditor's joint participation with state officials in the seizure of property being sufficient to characterize the creditor as a "state actor" for purposes of the Fourteenth Amendment, so that the creditor is acting under color of state law in participating in the deprivation of property. (Burger, Ch. J., and Powell, Rehnquist, and O'Connor, JJ., dissented from this holding.)

SYLLABUS: This case concerns the relationship between the requirement of "state action" to establish a violation of the Fourteenth Amendment, and the requirement of action "under color of state law" to establish a right to recover under 42 U. S. C. § 1983, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. Respondents filed suit in Virginia state court on a debt owed by petitioner, and sought prejudgment attachment of certain of petitioner's property. Pursuant to Virginia law, respondents alleged, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; a hearing on the propriety of the attachment was later conducted; and 34 days after the levy the trial judge dismissed the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under § 1983, alleging that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment, and that the complaint therefore did not state a valid claim under § 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of § 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree.

Held:

1. Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. *Sniadach v. Family Finance Corp.*, 395 U.S. 337. And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that conduct is also action under color of state law and will support a suit under § 1983. Pp. 926-935.

2. Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Pp. 936-939.

3. Insofar as petitioner alleged only misuse or abuse by respondents of Virginia law, he did not state a cause of action under § 1983, but challenged only private action. Such challenged conduct could not be ascribed to any governmental decision, nor did respondents have the authority of state officials to put the weight of the State behind their private decision. However, insofar as petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause, he did present a valid cause of action under § 1983. The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. Respondents were, therefore, acting under color of state law in participating in the deprivation of petitioner's property. Pp. 939-942.

COUNSEL: Robert L. Morrison, Jr., argued the cause and filed a brief for petitioner.

James W. Haskins argued the cause for respondents. With him on the brief was H. Victor Millner, Jr.

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

JUDGES: WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, post, p. 943. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, post, p. 944.

OPINIONBY: WHITE

OPINION: [*923] [***486] [**2746] JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

[***487] [HN1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the [*924] United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person [**2747] within its jurisdiction the equal protection of the laws."

[HN2] Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action."

[***HR1A] [HN3] Title 42 U. S. C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" n1 This case concerns the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action.

-----Footnotes-----

n1 Title 42 U. S. C. § 1983, at the time in question, provided in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

-----End Footnotes-----

I

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. Va. Code § 8.01-533 (1977). n2 The prejudgment attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's [*925] property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition. n3

-----Footnotes-----

n2 At the time of the attachment in question, this section was codified as Va. Code § 8-519 (1973).

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

n3 The principal action then proceeded to the entry of judgment on the debt in favor of Edmondson and some of petitioner's property was sold in execution of the judgment.

-----End Footnotes-----

Petitioner subsequently brought this action under 42 U. S. C. § 1983 against Edmondson and its president. His complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The lower courts construed the complaint as alleging a due process violation both from a misuse of the Virginia procedure and from the [***488] statutory procedure itself. n4 He sought compensatory and punitive damages for specified financial loss allegedly caused by the improvident attachment.

-----Footnotes-----

n4 In his answer to respondents' motion to dismiss on abstention grounds petitioner stated that "[no] question of the constitutional validity of the State statutes is made." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court responded to this as follows: "[Despite] plaintiff's protests to the contrary . . . the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F.2d 1058, 1060, n. 1 (CA4 1981).

-----End Footnotes-----

Relying on *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment and that the complaint therefore did not state a claim upon which relief could be granted under § 1983. Petitioner appealed; the Court of Appeals for the Fourth Circuit, sitting en banc, affirmed, with three dissenters. n5 639 F.2d 1058 (1981).

-----Footnotes-----

n5 The case was originally argued before a three-judge panel. The Court of Appeals, however, acting sua sponte, set the matter for a rehearing en banc.

-----End Footnotes-----

[*926] [**2748] The Court of Appeals rejected the District Court's reliance on *Flagg Brothers* in finding that the requisite state action was missing in this case. The participation of state officers in executing the levy sufficiently distinguished this case from *Flagg Brothers*. The Court of Appeals stated the issue as follows:

"[Whether] the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983." 639 F.2d, at 1061-1062 (footnote omitted).

The court distinguished between the acts directly chargeable to respondents and the larger context within which those acts occurred, including the direct levy by state officials on petitioner's property. While the latter no doubt amounted to state action, the former was not so clearly action under color of state law. The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

enforcing officer has been compromised to a significant degree. Because the court thought none of these elements was present here, the complaint failed to allege conduct under color of state law.

Because this construction of the under-color-of-state-law requirement appears to be inconsistent with prior decisions of this Court, we granted certiorari. 452 U.S. 937 (1981).

II

[***HR2A] Although the Court of Appeals correctly perceived the importance of Flagg Brothers to a proper resolution of this case, [*927] it misread [***489] that case. n6 It also failed to give sufficient weight to that line of cases, beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), in which the Court considered constitutional due process requirements in the context of garnishment actions and prejudgment attachments. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards. Flagg Brothers distinguished them on the ground that in each there was overt, official involvement in the property deprivation; there was no such overt action by a state officer in Flagg Brothers. 436 U.S., at 157. Although this case falls on the *Sniadach*, and not the Flagg Brothers, side of this distinction, the Court of Appeals thought the garnishment and attachment cases to be irrelevant because none but *Fuentes* arose under 42 U. S. C. § 1983 and because *Fuentes* was [**2749] distinguishable. n7 [*928] It determined that it could ignore all of them because the issue in this case was not whether there was state action, but rather whether respondents acted under color of state law.

[***HR2B]

-----Footnotes----- n6 JUSTICE POWELL suggests that our opinion is not "consistent with the mode of inquiry prescribed by our cases." Post, at 946. We believe the situation to be just the opposite. We rely precisely upon the ground that the majority itself put forth in Flagg Brothers to distinguish that case from the earlier prejudgment attachment cases: "This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies." 436 U.S., at 157. JUSTICE POWELL at no point mentions this aspect of the Flagg Brothers decision. The method of inquiry we adopt is that suggested by *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and seemingly approved in Flagg Brothers: Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party.

n7 The Court of Appeals held *Fuentes v. Shevin* not to be relevant because the defendants in that case included the State Attorney General, as well as the private creditor. In the court's view, the presence of a state official made the "private party defendant . . . merely a nominal party to the action for injunctive relief." 639 F.2d, at 1068, n. 22. Judge Butzner, in dissent, found *Fuentes* to be directly controlling.

-----End Footnotes-----

As we see it, however, the two concepts cannot be so easily disentangled. Whether they are identical or not, the state-action and the under-color-of-state-law requirements are obviously related. n8 Indeed, until recently this Court did not distinguish between the two requirements at all.

-----Footnotes-----

n8 The Court of Appeals itself recognized this when it stated that in two of three basic patterns of § 1983 litigation -- that in which the defendant is a public official and that in which he is a private party -- there is no distinction between

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

state action and action under color of state law. Only when there is joint action by private parties and state officials, the court stated, could a distinction arise between these two requirements.

-----End Footnotes-----

A

In *United States v. Price*, 383 U.S. 787, 794, n. 7 (1966), we explicitly stated that the requirements were identical: [HN4] "In cases under § 1983, 'under color' of law has consistently been [***490] treated as the same thing as the 'state action' required under the Fourteenth Amendment." n9 In support of this proposition the Court cited *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). n10 In both of these [*929] cases black voters in Texas challenged their exclusion from party primaries as a violation of the Fifteenth Amendment and sought relief under 8 U. S. C. § 43 (1946 ed.). n11 In each case, the Court understood the problem before it to be whether the discriminatory policy of a private political association could be characterized as "state action within the meaning of the Fifteenth Amendment." *Smith*, supra, at 664. n12 Having found state action under the Constitution, there was no further inquiry into whether the action of the political associations also met the statutory requirement of action "under color of state law."

-----Footnotes-----

n9 We also stated that if an indictment "[alleges] conduct on the part of the 'private' defendants which constitutes 'state action,' [it alleges] action 'under color' of law within [18 U. S. C.] § 242." 383 U.S., at 794, n. 7. In *Monroe v. Pape*, 365 U.S. 167, 185 (1961), the Court held that "under color of law" has the same meaning in 18 U. S. C. § 242 as it does in § 1983.

n10 Besides these two Supreme Court cases, the Court cited a number of lower court cases in support of the proposition that the constitutional concept of state action satisfies the statutory requirement of action under color of state law. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (CA4 1963); *Smith v. Holiday Inns*, 336 F.2d 630 (CA6 1964); *Hampton v. City of Jacksonville*, 304 F.2d 320 (CA5 1962); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (CA5 1960); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (CA4 1945). Each of these cases involved litigation between private parties in which the plaintiffs alleged unconstitutional discrimination. In each case, the only inquiry was whether the private-party defendant met the state-action requirement of the Fourteenth Amendment. Once that requirement was met, the courts granted the relief sought.

n11 Title 8 U. S. C. § 43 (1946 ed.) was reclassified as 42 U. S. C. § 1983 in 1952.

n12 There was no opinion for the Court in *Terry v. Adams*. All three opinions in support of the reversal of the lower court decision pose the question as to whether the action of the private political association in question, the Jaybird Democratic Association, constituted state action for purposes of the Fifteenth Amendment. None suggests that a Fifteenth Amendment violation by the private association might not support a cause of action because of a failure to prove action under color of state law.

-----End Footnotes-----

[***HR3] Similarly, it is clear that [HN5] in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. The

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

Court's conclusion in *United States v. Classic*, 313 U.S. 299, 326 [**2750] (1941), that "[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law," was founded on the rule announced in *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880), that the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment. n13

-----Footnotes-----

n13 *United States v. Classic* did not involve § 1983 directly; rather, it interpreted 18 U. S. C. § 242 (then 18 U. S. C. § 52 (1940 ed.)), which is the criminal counterpart of 42 U. S. C. § 1983. See n. 9, *supra*, on the relationship between 18 U. S. C. § 242 and 42 U. S. C. § 1983.

-----End Footnotes-----

[*930] The [***491] decision of the Court of Appeals rests on a misreading of *Flagg Brothers*. In that case the Court distinguished two elements of a § 1983 action:

"[Plaintiffs] are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that *Flagg Brothers* deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970)." 436 U.S., at 155-156.

Plaintiffs' case foundered on the first requirement. Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action. The Court concluded that the sale, although authorized by state law, did not amount to state action under the Fourteenth Amendment, and therefore set aside the Court of Appeals' contrary judgment.

There was no reason in *Flagg Brothers* to address the question whether there was action under color of state law. The Court expressly eschewed deciding whether that requirement was satisfied by private action authorized by state law. *Id.*, at 156. Although the state-action and under-color-of-state-law requirements are "separate areas of inquiry," *Flagg Brothers* did not hold nor suggest that state action, if present, might not satisfy the § 1983 requirement of conduct under color of state law. Nevertheless, the Court of Appeals relied on *Flagg Brothers* to conclude in this case that state action under the Fourteenth Amendment is not necessarily action under color of state law for purposes of § 1983. We do not agree.

The two-part approach to a § 1983 cause of action, referred to in *Flagg Brothers*, was derived from *Adickes v. [**931] S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). *Adickes* was a § 1983 action brought against a private party, based on a claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Although stating that the § 1983 plaintiff must show both that he has been deprived "of a right secured by the 'Constitution and laws' of the United States" and that the defendant acted "under color of any statute . . . of any State," *ibid.*, we held that [HN6] the private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights" and action "under color" of law for purposes of the statute." *Id.*, at 152. n14 In [*932]support of our [***492] conclusion [**2751] that a private party held to have violated the Fourteenth Amendment "can be liable under § 1983," *ibid.*, we cited that part of *United States v. Price*, 383 U.S., at 794, n. 7, in which we had concluded that state action and action under color of state law are the same (quoted *supra*, at 928). *Adickes* provides no support for the Court of Appeals' novel construction of § 1983. n15

-----Footnotes-----

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

n14 The Adickes opinion contained the following statement, 398 U.S., at 162, n. 23: "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." This statement obviously was meant neither to establish the definition of action under color of state law, nor to establish a distinction between this statutory requirement and the constitutional standard of state action. The statement was made in response to an argument that the discrimination by the private party was pursuant to the state trespass statute and that this would satisfy the requirements of § 1983. The Court rejected this because there had been no factual showing that the defendants had acted with knowledge of, or pursuant to, this statute. It was in this context, that this statement was made.

JUSTICE BRENNAN, writing separately, did suggest in Adickes that "when a private party acts alone, more must be shown . . . to establish that he acts 'under color of' a state statute or other authority than is needed to show that his action constitutes state action." *Id.*, at 210 (footnote omitted). Even in his view, however, when a private party acts in conjunction with a state official, whatever satisfies the state-action requirement of the Fourteenth Amendment satisfies the under-color-of-state-law requirement of the statute. JUSTICE BRENNAN's position rested, at least in part, on a much less strict standard of what would constitute "state action" in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court.

n15 JUSTICE POWELL's discussion of Adickes confuses the two counts of the complaint in that case. There was a conspiracy count which alleged that respondent -- a private party -- and a police officer had conspired "(1) 'to deprive [petitioner] of her right to enjoy equal treatment and service in a place of public accommodation'; and (2) to cause her arrest 'on the false charge of vagrancy.'" *Id.*, at 149-150. It was with respect to this count, which did not allege any unconstitutional statute or custom, that the Court held that joint action of the private party and the police officer was sufficient to support a § 1983 suit against that party. The other count of her complaint was a substantive count in which she alleged that the private act of discrimination was pursuant to a "custom of the community to segregate the races in public eating places." Here the Court did not rely on any "joint action" theory, but held that "petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom." *Id.*, at 171, 173. JUSTICE POWELL is wrong when he summarizes Adickes as holding that "a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." *Post*, at 954-955. This is to confuse the conspiracy and the substantive counts at issue in Adickes. Unless one argues that the state vagrancy law was unconstitutional -- an argument no one made in Adickes -- the joint action count of Adickes did not involve a state law, whether "plainly unconstitutional" or not.

- - - - -End Footnotes- - - - -

B

[***HR1B] The decision of the Court of Appeals is difficult to reconcile with the Court's garnishment and prejudgment attachment cases and with the congressional purpose in enacting § 1983.

Beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the Court has consistently held that [HN7] constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers [*933] of the State act jointly with a creditor in securing the property in dispute. *Sniadach and North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), involved state-created garnishment procedures; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), [***493] involved execution of a vendor's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in litigation between creditor and debtor in the state courts and no state official was named as a party. Nevertheless, in each case the Court entertained and adjudicated the defendant-debtor's claim that the procedure under which the private creditor secured the disputed property violated federal constitutional standards of due process. Necessary to that conclusion is the holding that [HN8] private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment.

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

Fuentes v. Shevin, 407 U.S. 67 (1972), was a § 1983 [**2752] action brought against both a private creditor and the State Attorney General. The plaintiff sought declaratory and injunctive relief, on due process grounds, from continued enforcement of state statutes authorizing prejudgment replevin. The plaintiff prevailed; if the Court of Appeals were correct in this case, there would have been no § 1983 cause of action against the private parties. Yet they remained parties, and judgment ran against them in this Court. n16

-----Footnotes-----

n16 We thus find incomprehensible JUSTICE POWELL's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. Post, at 950. Likewise, his discussion of these cases, post, at 952-953, steadfastly ignores the predicate for the holding in each case that the debtor could challenge the constitutional adequacy of the private creditor's seizure of his property. That predicate was necessarily the principle that a private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state-action requirement of the Fourteenth Amendment and warrants relief against the private party.

-----End Footnotes-----

[*934] If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under § 1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

To read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived. The Act was passed "for the express purpose of '[enforcing] the Provisions of the Fourteenth Amendment.'" *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972). The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement [***494] of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] so very simple and really [reenacts] the Constitution." *Cong. Globe*, 42d Cong., 1st Sess., 569 (1871). Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution." *Id.*, App. 81. n17

-----Footnotes-----

n17 In fact, throughout the congressional debate over the 1871 Act, the bill was officially described as a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." See also, e. g., remarks of Senator Trumbull in describing the purpose of the House in passing the Act: "[As] the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States," *Cong. Globe*, 42d Cong., 1st Sess., 579 (1871); and remarks of Representative Shellabarger on the relationship between § 1 of the bill and the Fourteenth Amendment, *id.*, App. 68.

-----End Footnotes-----

[*935]

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

[***HR4A] In sum, the line drawn by the Court of Appeals is inconsistent with our prior cases and would substantially undercut the congressional purpose in providing the § 1983 cause of action. If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983. n18

[***HR4B]

-----Footnotes----- n18 Our conclusion in this case is not inconsistent with the statement in *Flagg Brothers* that "these two elements [state action and action under color of state law] denote two separate areas of inquiry." 436 U.S., at 155-156. First, although we hold that conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action. If action under color of state law means nothing more than that the individual act "with the knowledge of and pursuant to that statute," *Adickes v. S. H. Kress & Co.*, 398 U.S., at 162, n. 23, then clearly under *Flagg Brothers* that would not, in itself, satisfy the state-action requirement of the Fourteenth Amendment. Second, although we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment, § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state-action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

Nor is our decision today inconsistent with *Polk County v. Dodson*, 454 U.S. 312 (1981). In *Polk County*, we held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would not support a § 1983 suit. Although we analyzed the public defender's conduct in light of the requirement of action "under color of state law," we specifically stated that it was not necessary in that case to consider whether that requirement was identical to the "state action" requirement of the Fourteenth Amendment: "Although this Court has sometimes treated the questions as if they were identical, see *United States v. Price*, 383 U.S. 787, 794, and n. 7 (1966), we need not consider their relationship in order to decide this case." *Id.*, at 322, n. 12. We concluded there that a public defender, although a state employee, in the day-to-day defense of his client, acts under canons of professional ethics in a role adversarial to the State. Accordingly, although state employment is generally sufficient to render the defendant a state actor under our analysis, *infra*, at 937, it was "peculiarly difficult" to detect any action of the State in the circumstances of that case. 454 U.S., at 320. In *Polk County*, we also rejected respondent's claims against governmental agencies because he "failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments." *Id.*, at 326. Because respondent failed to challenge any rule of conduct or decision for which the State was responsible, his allegations would not support a claim of state action under the analysis proposed below. *Infra*, at 937. Thus, our decision today does not suggest a different outcome in *Polk County*.

-----End Footnotes-----

[*936] [**2753] III

[***495]

[***HR5] As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Brothers*, 436 U.S., at 156. As the Court said in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974):

"In 1883, this Court in the Civil Rights Cases, 109 U.S. 3, affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of [*937] their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the [HN9] conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In *Sniadach*, *Fuentes*, *W. T. Grant*, and *North Georgia*, for example, a state statute provided the right to garnish or to [**2754] obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Although related, these two principles are not the same. [HN10] They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961). The two principles diverge when the constitutional claim is directed against a [***496] party without such apparent authority, i. e., against a private party. The difference between the two inquiries is well illustrated by comparing *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972), with *Flagg Brothers*, supra.

In *Moose Lodge*, the Court held that the discriminatory practices of the appellant did not violate the Equal Protection Clause because those practices did not constitute "state action." The Court focused primarily on the question of [*938] whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision. n19 The inquiry, therefore, looked to those policies adopted by the State that were applied to appellant. The Court concluded as follows:

"We therefore hold, that with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to . . . make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S., at 177.

In other words, the decision to discriminate could not be ascribed to any governmental decision; those governmental decisions that did affect Moose Lodge were unconnected with its discriminatory policies. n20

-----Footnotes-----

n19 There are elements of the other state-action inquiry in the opinion as well. This is found primarily in the effort to distinguish the relationship of Moose Lodge and the State from that between the State and the restaurant considered in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). See 407 U.S., at 175.

n20 The "one exception" further illustrates this point. The Court enjoined enforcement of a state rule requiring Moose Lodge to comply with its own constitution and bylaws insofar as they contained racially discriminatory provisions. State enforcement of this rule, either judicially or administratively, would, under the circumstances, amount to a governmental decision to adopt a racially discriminatory policy.

-----End Footnotes-----

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

Flagg Brothers focused on the other component of the state-action principle. In that case, the warehouseman proceeded under New York Uniform Commercial Code, § 7-210, and the debtor challenged the constitutionality of that provision on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Undoubtedly the State was responsible for the statute. The response of the Court, however, focused not on the terms of the statute but on the character of the defendant to the § 1983 [*939] suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." The Court suggested that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: e. g., the "public function" test, see *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 [**2755] (1946); the "state compulsion" test, see *Adickes v. S. H. Kress & Co.*, 398 U.S., at 170; the "nexus" test, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 [***497] (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 U.S., at 157. n21 Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. See *Burton*, supra, at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

-----Footnotes-----

n21 Contrary to the suggestion of JUSTICE POWELL's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." Post, at 951. The holding today, as the above analysis makes clear, is limited to the particular context of prejudgment attachment.

-----End Footnotes-----

IV

[**HR6] Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors."

[*940] Both the District Court and the Court of Appeals noted the ambiguous scope of petitioner's contentions: "There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him." 639 F.2d, at 1060, n. 1. Both courts held that resolution of this ambiguity was not necessary to their disposition of the case: both resolved it, in any case, in favor of the view that petitioner was attacking the constitutionality of the statute as well as its misapplication. In our view, resolution of this issue is essential to the proper disposition of the case.

Petitioner presented three counts in his complaint. Count three was a pendent claim based on state tort law; counts one and two claimed violations of the Due Process Clause. Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, oppressive [sic], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, i. e., this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 (1961). That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Count one is a different matter. That count describes the procedures [***498] followed by respondents in obtaining the prejudgment attachment as well as the fact that the state court subsequently ordered the attachment dismissed because respondents had not met their burden under state law. Petitioner [*941] then summarily states that this sequence of

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

events deprived him of his property without due process. Although it is not clear whether petitioner is referring to the state-created procedure or the misuse of that procedure by respondents, we agree with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally [**2756] defective under the Fourteenth Amendment. n22

-----Footnotes-----

n22 This confusion in the nature of petitioner's allegations continued in oral argument in this Court. Although at various times counsel for petitioner seemed to deny that petitioner challenged the constitutionality of the statute, see, e. g., Tr. of Oral Arg. 11, he also stated that

"[the] claim is that the action as taken, even if it were just line by line in accordance with Virginia law -- whether or not they did it right, the claim is that it was in violation of Lugar's constitutional rights." Id., at 19.

-----End Footnotes-----

[HN11] While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.

As is clear from the discussion in Part II, we have consistently held that [HN12] a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co.*, supra, at 152, in the context of an equal protection deprivation:

"Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," quoting *United States v. Price*, 383 U.S., at 794.

[*942] The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute.

In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of [***499] the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute. n23

-----Footnotes-----

n23 JUSTICE POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture. What we said in *Adickes*, 398 U.S., at 174, n. 44, when confronted with this question is just

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

as applicable today: "We intimate no views concerning the relief that might be appropriate if a violation is shown. The parties have not briefed these remedial issues, and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. *Pierson v. Ray*, 386 U.S. 547 (1967)" (citations omitted).

-----End Footnotes-----

The judgment is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

DISSENTBY: BURGER; POWELL

DISSENT: [*943] CHIEF JUSTICE BURGER, dissenting.

Whether we are dealing with suits under § 1983 or suits brought pursuant to the Fourteenth Amendment, in my view the inquiry is the same: is the claimed infringement [**2757] of a federal right fairly attributable to the State. *Rendell-Baker v. Kohn*, ante, at 838. Applying this standard, it cannot be said that the actions of the named respondents are fairly attributable to the State. * Respondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious "but for" analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondents' acts into actions of the State. This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State. *Dennis v. Sparks*, 449 U.S. 24 (1980). Similarly, one who practices a trade or profession, drives an automobile, or builds a house under a state license is not engaging in acts fairly attributable to the state. In both *Dennis* and the instant case petitioner's remedy lies in private suits for damages such as malicious prosecution. The Court's opinion expands the reach of the statute beyond anything intended by Congress. It may well be a consequence of too casually falling into a [***500] semantical trap because of the figurative use of the term "color of state law."

-----Footnotes-----

* The pleadings in this case amply demonstrate that the challenged conduct was directed solely at respondents' acts. The unlawful actions alleged were that respondents made "conclusory allegations," App. 5, respondents lacked a "factual basis" for attachment, id., at 10, and respondents lacked "good cause to believe facts which would support" attachment. Id., at 19. There is no allegation of collusion or conspiracy with state actors.

-----End Footnotes-----

[*944] JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent -- a small wholesale oil dealer in Southside, Va. -- brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt. n1 The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors. n2 No court had questioned the validity of the statute, and it remains presumptively valid. The Clerk of the state court duly

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

issued a writ of attachment, and the County Sheriff then executed it. There is no allegation that respondent conspired with the state officials to deny petitioner the fair protection of state or federal law.

-----Footnotes-----

n1 The state action, filed in the name of the Edmondson Oil Co., alleged that Lugar owed \$41,983 for products and merchandise previously delivered. App. 22. In the present suit Lugar has named as defendants both the Edmondson Oil Co. and its president, Ronald Barbour. As the respondent Barbour is the sole stockholder of Edmondson Oil Co., id., at 2, and appears to have directed all its actions in this litigation, see id., at 26, I refer throughout to Barbour as if he were the sole respondent.

n2 See Va. Code § 8.01-533 et seq. (1977). At the time of the attachment in this case, the applicable provisions were Va. Code § 8-519 et seq. (1973). The Virginia attachment provisions have remained essentially in their present form despite numerous recodifications since 1819. See Va. Code § 8-519 et seq. (1950); Va. Code § 6378 et seq. (1919); Va. Code § 2959 et seq. (1887); Va. Code, ch. 151 (1849); Va. Code, ch. 123 (1819).

-----End Footnotes-----

[*945] Respondent ultimately prevailed in his lawsuit. The petitioner Lugar was ordered by a court to pay his debt. A state court did find, however, that Lugar's assets [**2758] should not have been attached prior to a judgment on the underlying action.

Following this decision Lugar instituted legal action in the United States District Court for the Western District of Virginia. Suing under a federal statute, 42 U. S. C. § 1983, Lugar alleged that the respondent -- by filing a petition in state court -- had acted "under color of law" and had caused the deprivation of constitutional rights under the Fourteenth Amendment -- an Amendment that does not create rights enforceable against private citizens, such as one would have assumed respondent to be, but only against the States. *Rendell-Baker v. Kohn*, ante, at 837; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883). n3 [***501] Both the District Court and the Court of Appeals agreed that petitioner had no cause of action under § 1983. They sensibly found that respondent could not be held responsible for any deprivation of constitutional rights and that the suit did not belong in federal court.

-----Footnotes-----

n3 Title 42 U. S. C. § 1983, at the time in question, provided:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

-----End Footnotes-----

This Court today reverses the judgment of those lower courts. It holds that respondent, a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in "state action." This decision is as unprecedented as it is implausible. It is plainly unjust to the respondent, and the Court makes no [*946] argument to the contrary. Respondent, who was represented by counsel, could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a "state actor" liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia. Nor is the Court's analysis consistent with the

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

mode of inquiry prescribed by our cases. On the contrary, the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of "state action" and private action "under color of law."

I

The plain language of 42 U. S. C. § 1983 establishes that a plaintiff must satisfy two jurisdictional requisites to state an actionable claim. First, he must allege the violation of a right "secured by the Constitution and laws" of the United States. Because "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc. v. Brooks*, 436 U.S., at 156, this requirement compels an inquiry into the presence of state action. Second, a § 1983 plaintiff must show that the alleged deprivation was caused by a person acting "under color" of law. In *Flagg Bros.*, this Court affirmed that "these two elements denote two separate areas of inquiry." *Id.*, at 155-156. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

This case demonstrates why separate inquiries are required. Here it is not disputed that the Virginia Sheriff and Clerk of Court, the state officials who sequestered petitioner's property in the manner provided by Virginia law, engaged in state action. Yet the petitioner, while alleging constitutional injury from this action by state officials, did not sue the State or its agents. In these circumstances the Court of Appeals correctly stated that the relevant inquiry was the second identified in *Flagg Bros.*: whether the respondent, a private citizen whose only action was to invoke a presumptively valid state attachment process, [**2759] had acted under color of state law in "causing" the State to deprive petitioner [*947] of alleged constitutional [***502]rights. n4 Consistently with past decisions of this Court, the Court of Appeals concluded that respondent's private conduct had not occurred under color of law.

-----Footnotes-----

n4 Judge Phillips' excellent opinion for the en banc Court of Appeals correctly defined the question presented as "whether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within the contemplation of § 1983." 639 F.2d 1058, 1061-1062 (CA4 1981) (footnote omitted).

-----End Footnotes-----

Rejecting the reasoning of the Court of Appeals, the Court opinion inexplicably conflates the two inquiries mandated by *Flagg Bros.* Ignoring that this case involves two sets of actions -- one by respondent, who merely filed a suit and accompanying sequestration petition; another by the state officials, who issued the writ and executed the lien -- it wrongly frames the question before the Court, not as whether the private respondent acted under color of law in filing the petition, but as "whether . . . respondents, who are private parties, may be appropriately characterized as 'state actors.'" Ante, at 939. It then concludes that they may, on the theory that a private party who invokes "the aid of state officials to take advantage of state-created attachment procedures" is a "joint participant" with the State and therefore a "state actor." "The rule," the Court asserts, is as follows:

"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in a joint activity with the State or its agents." Ante, at 941, quoting *Adickes v. S. H. Kress & Co.*, supra, at 152, in turn quoting *United States v. Price*, 383 U.S. 787, 794 (1966).

[*948] There are at least two fallacies in the Court's conclusion. First, as is apparent from the quotation, our cases have not established that private "joint participants" with state officials themselves necessarily become state actors. Where private citizens interact with state officials in the pursuit of merely private ends, the appropriate inquiry generally is whether the private parties have acted "under color of law." Second, even when the inquiry is whether an action

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

occurred under color of law, our cases make clear that the "joint participation" standard is not satisfied when a private citizen does no more than invoke a presumptively valid judicial process in pursuit only of legitimate private ends.

II

As this Court recognized in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), the historic purpose of § 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the [***503] Fourteenth Amendment. n5 The Court accordingly is correct that an important inquiry in a § 1983 suit against a private party is whether there is an allegation of wrongful [**2760] "conduct that can be attributed to the State." Ante, at 941. This is the first question referred to in *Flagg Bros.* But there still remains the second *Flagg Bros.* question: whether this state action fairly can be attributed to the respondent, whose [*949] only action was to invoke a presumptively valid attachment statute. This question, unasked by the Court, reveals the fallacy of its conclusion that respondent may be held accountable for the attachment of property because he was a "state actor." n6 From the occurrence of state action taken by the Sheriff who sequestered petitioner's property, it does not follow that respondent became a "state actor" simply because the Sheriff was. This Court, until today, has never endorsed this non sequitur.

-----Footnotes-----

n5 State officials acting in their official capacities, even if in abuse of their lawful authority, generally are held to act "under color" of law. E. g., *Monroe v. Pape*, 365 U.S., at 171-172; *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880). This is because such officials are "clothed with the authority" of state law, which gives them power to perpetrate the very wrongs that Congress intended § 1983 to prevent. *United States v. Classic*, 313 U.S. 299, 326 (1941); *Ex parte Virginia*, supra, at 346-347. Cf. *Polk County v. Dodson*, 454 U.S. 312 (1981) (a public defender, representing an indigent client in a criminal proceeding, performs a function for which the authority of his state office is not needed, and therefore does not act under color of state law when engaged in a defense attorney's traditionally private roles).

n6 The Court, ante, at 928, quotes *United States v. Price*, 383 U.S. 787, 794, n. 7 (1966), as establishing that "[in] cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." In *Price*, however, the same conduct by the same actors constituted both "state action" and the action "under color" of law. See 383 U.S., at 794, n. 7 (if an indictment alleges "conduct on the part of the 'private' defendants which constitutes 'state action,' [it also alleges] action 'under color of law' . . ."). The situation in this case is quite different. The present case involves "state action" by the Sheriff -- action that also was "under color of law" under *Price*. But the real question here is whether the conduct of the private respondent constituted either state action or action under color of law. The *Price* quotation plainly does not resolve this question. And the cases cited in *Price*, on which the Court also relies, are similarly inapposite.

-----End Footnotes-----

It of course is true that respondent's private action was followed by state action, and that the private and the state actions were not unconnected. But "[that] the State responds to [private] actions by [taking action of its own] does not render it responsible for those [private] actions." *Blum v. Yaretsky*, post, at 1005. See *Flagg Bros.*, 436 U.S., at 164-165; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered "state action" within the meaning of our cases. See, e. g., *Blum v. Yaretsky*, post, at 1004-1005; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-173 (1972). As in *Jackson v. Metropolitan Edison Co.*, supra, "[respondent's] exercise of the choice allowed by state law where [*950] the initiative comes from it and not from the State, does not make its action in [***504] doing so 'state action' for purposes of the Fourteenth Amendment." 419 U.S., at 357 (footnote omitted).

This Court of course has held that private parties are amenable to suit under § 1983 when "jointly engaged" with state officials in the violation of constitutional rights. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). n7 Yet the Court, in advancing its "joint participation" theory, does not cite a single case in which a private decision to invoke a

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

presumptively valid state legal process has been held to constitute state action. Even the quotation on which the Court principally relies for its statement of the applicable "rule," ante, at 941, does not refer to state action. Rather, it states explicitly that "[private] persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."

-----Footnotes-----

n7 In *Adickes* the term "jointly engaged" appears to have been used specifically to connote engagement in a "conspiracy." See 398 U.S., at 152-153.

-----End Footnotes-----

As illustrated by this quotation, our cases have recognized a distinction between "state action" and private action under "color of law." This distinction is sound in principle. It also is consistent with and supportive of the distinction between "private" conduct and government action that is subject to the procedural limitations of the Due Process Clause of the Fourteenth Amendment. As the Court itself notes: "Careful adherence to the [**2761] 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." Ante, at 936.

A "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be personally responsible for wrongs that they cause to occur. But it does not confuse private actors with the [*951] State -- the fallacy of the analysis adopted today by the Court. In this case involving the private action of the respondent in petitioning the state courts of Virginia, the appropriate inquiry as to respondent's liability is not whether he was a state actor, but whether he acted under color of law. It is to this question that I therefore turn.

III

Contrary to the position of the Court, our cases do not establish that a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law. In *Dennis v. Sparks*, 449 U.S. 24 (1980), we held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In so holding, however, we explicitly stated that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*, at 28. This conclusion is reinforced by our more recent decision in *Polk County v. Dodson*, 454 U.S. 312 (1981). As we held [***505] to be true with respect to the defense of a criminal defendant, invocation of state legal process is "essentially a private function . . . for which state office and authority are not needed." *Id.*, at 319. These recent decisions make clear that independent, private decisions made in the context of litigation cannot be said to occur under color of law. n8 The Court nevertheless advances two principal grounds for its holding to the contrary.

-----Footnotes-----

n8 The Court avers that its holding "is limited to the particular context of prejudgment attachment." Ante, at 939, n. 21. However welcome, this limitation lacks a principled basis. It is unclear why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (e. g., an injunction), or when summoning police to investigate a suspected crime.

-----End Footnotes-----

[*952] A

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

The Court argues that petitioner's action under § 1983 is supported by cases in which this Court has applied due process standards to state garnishment and prejudgment attachment procedures. The Court relies specifically on *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). According to the Court, these cases establish that a private party acts "under color" of law when seeking the attachment of property under an unconstitutional state statute. n9 In fact, a careful reading demonstrates that they provide no authority for this proposition.

-----Footnotes-----

n9 At one stage in the litigation the respondent averred that his lawsuit raised "[no] question of the constitutional validity of the State statutes." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court nevertheless concluded that "the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F.2d, at 1060, and n. 1.

-----End Footnotes-----

Of the cases cited by the Court, *Sniadach*, *Mitchell*, and *Di-Chem* all involved attacks on the validity of state attachment or garnishment statutes. None of the cases alleged that the private creditor was a joint actor with the State, and none involved a claim for damages against the [*2762] creditor. Each case involved a state suit, not a federal action under § 1983. It therefore was unnecessary in any of these cases for this Court to consider whether the creditor, by virtue of instituting the attachment or garnishment, became a state actor or acted under color of state law. There is not one word in any of these cases that so characterizes the private creditor. n10 In *Fuentes* [***506] v. *Shevin*, the Court did consider a [*953] § 1983 action against a private creditor as well as the State Attorney General. n11 Again, however, the only question before this Court was the validity of a state statute. No claim was made that the creditor was a joint actor with the State or had acted under color of law. No damages were sought from the creditor. Again, there was no occasion for this Court to consider the status under § 1983 of the private party, and there is not a word in the opinion that discusses this. As with *Sniadach*, *Mitchell*, and *Di-Chem*, *Fuentes* thus fails to establish that a private party's mere invocation of state attachment or garnishment procedures represents action under color of law -- even in a case in which those procedures are subsequently held to be unconstitutional.

-----Footnotes-----

n10 The Court finds support for its contrary view only by reading these cases as implicitly embracing the same fallacy as the Court does today. In *Sniadach*, *Mitchell*, and *Di-Chem* -- as in this case -- there was no question that state action had occurred. There, as here, some official of the State -- an undisputed state actor -- had undertaken either to attach property or garnish wages. For the Court, the occurrence of state action by these state officials ipso facto establishes that the private plaintiffs also must have been viewed as state actors. Given the presence of state action by the state officials, however, there was no need to inquire whether the private parties also were state actors. It is plain from the opinions that the Court did not do so. Nor, in cases arising in state court, was there any need to consider whether the private defendants had acted under color of law within the meaning of § 1983.

n11 *Fuentes* was consolidated with a case involving similar facts, *Epps v. Cortese*, 326 F.Supp. 127 (ED Pa. 1971).

-----End Footnotes-----

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

In addition to relying on cases involving the constitutionality of state attachment and garnishment statutes, the Court advances a "joint participation" theory based on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). In *Adickes* the plaintiff sued a private restaurant under § 1983, alleging a conspiracy between the restaurant and local police to deprive her of the right to equal treatment in a place of public accommodation. *Id.*, at 152, 153. Reversing the decision below, this Court upheld the cause of action. It found that the private defendant, in "conspiring" with local police to obtain official enforcement of a state custom of racial segregation, engaged in a "'joint activity with the State or its agents'" [*954] and therefore acted under color of law within the meaning of § 1983. *Id.*, at 152 (quoting *United States v. Price*, 383 U.S., at 794).

Contrary to the suggestion of the Court, however, Justice Harlan's Court opinion in *Adickes* did not purport to define the term "under color of law." Attending closely to the facts presented, the Court observed that "[whatever] else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." 398 U.S., at 162, n. 23 (emphasis added). As indicated by this choice of language, the Court clearly seems to have contemplated some limiting principle. A citizen summoning the police to enforce the law ordinarily would not be considered to have engaged in a "conspiracy." Nor, presumably, would such a citizen be characterized as acting under color of law and thereby risking amenability to suit for constitutional violations that subsequently might occur. Surely there is nothing in *Adickes* to indicate that the Court would have found action under color of law in cases of this kind.

Although *Adickes* is distinguishable from these hypotheticals, the current case [**2763] is not. The conduct in *Adickes* occurred in 1964, 10 years after *Brown v. Board of Education*, 347 U.S. 483 (1954), [***507] and after the decade of publicized litigation that followed in its wake. In view of the intense national focus on issues of racial discrimination, it is virtually inconceivable that a private citizen then could have acted in the innocent belief that the state law and customs involved in *Adickes* still were presumptively valid. As Justice Harlan wrote, "[few] principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage segregation." 398 U.S., at 150-152. Construed as resting on this basis, *Adickes* establishes that a private [*955] party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity. In such a context, the private party could be characterized as hiding behind the authority of law and as engaging in "joint participation" with the State in the deprivation of constitutional rights. n12 Here, however, petitioner has alleged no conspiracy. Nor has he even alleged that respondent was invoking the aid of a law he should have known to be constitutionally invalid. n13 Finally, there is no allegation that respondent's decision to invoke legal process was in any way [*956] compelled by the law or custom of the State in which he lived. In this context *Adickes* simply is inapposite.

-----Footnotes-----

n12 Arguing that the patent unconstitutionality of racial discrimination was irrelevant to the "conspiracy" count in *Adickes*, the Court charges that this discussion confuses the conspiracy and the substantive causes of action. Ante, at 932, n. 15. The Court's view is difficult to understand. In *Adickes* the private defendant allegedly conspired with the police to "deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation," 398 U.S., at 150, n. 5, and apparently to cause her discriminatory and legally baseless arrest under a vagrancy statute. Because the vagrancy statute was not challenged as invalid on its face, the Court concludes that the "joint action" or "conspiracy" count "did not involve a state law, whether 'plainly unconstitutional' or not." Ante, at 932, n. 15. This conclusion is simply wrong. In the first place, the alleged "conspiracy" included an agreement to enforce a state law requiring racial segregation in restaurants. This law plainly was unconstitutional. Further, even the vagrancy statute certainly would have been unconstitutional as applied to enforce racial segregation. Presumably it was for these reasons that the Court agreed that the private defendant had "[conspired]" with the local police. 398 U.S., at 152. *Adickes* is entirely a different case from the one at bar.

n13 At least one scholarly commentator has stated a cautious conclusion that the Virginia attachment provisions would satisfy the standards established by this Court's recent due process decisions. See Brabham, *Sniadach Through Di-Chem*

457 U.S. 922, *, 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, 195-199 (1977). The correctness of this conclusion is not of course an issue in the present posture of the case, nor is it directly relevant to the case's proper resolution.

-----End Footnotes-----

Today's decision therefore is as unprecedented as it is unjust. n14

-----Footnotes-----

n14 The Court suggests that respondent may be entitled to claim good-faith immunity from this suit for civil damages. Ante, at 942, n. 23. This is a positive suggestion with which I agree. A holding of immunity will mitigate the ultimate cost of this litigation. It would not, however, convert the Court's holding into a just one. This case already has been in litigation for nearly five years. It will now be remanded for further proceedings. Respondent, solely because he undertook to assert rights authorized by a presumptively valid state statute, will have been subjected to the expense, distractions, and hazards of a protracted litigation.

-----End Footnotes-----

REFERENCES:

6 Am Jur 2d, Attachment and Garnishment 5; 15 Am Jur 2d, Civil Rights 19

21 Federal Procedure, L Ed, Creditors' Provisional Remedies 21:15-21:25

2 Am Jur Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 141-162

12 Am Jur Trials 193, Collection Practice

42 USCS 1983; Constitution, 14th Amendment

US L Ed Digest, Civil Rights 12.5; Constitutional Law 799

L Ed Index to Annos, Attachment or Garnishment; Civil Rights; Due Process of Law

ALR Quick Index, Attachment or Garnishment; Discrimination; Due Process of Law

Federal Quick Index, Attachment and Garnishment; Civil Rights; Due Process of Law

Annotation References:

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS 1983) providing private right of action for violation of federal rights. 43 L Ed 2d 833.

Supreme Court's view as to applicability, to conduct of private person or entity, of equal protection and due process clauses of the Fourteenth Amendment. 42 L Ed 2d 922.

JACQUELINE MANIKHI v. MASS TRANSIT ADMINISTRATION et al.
No. 106, September Term, 1999

COURT OF APPEALS OF MARYLAND

360 Md. 333; 758 A.2d 95; 2000 Md. LEXIS 517

August 24, 2000, Filed

SUBSEQUENT HISTORY: [***1] As Corrected September 1, 2000.

PRIOR HISTORY: Certiorari to the Court of Special Appeals (Circuit Court for Baltimore City). Case No. 97073040/CC437. Robert I. H. Hammerman, JUDGE.

DISPOSITION: JUDGMENT OF THE COURT OF SPECIAL APPEALS ON COUNT II (FALSE IMPRISONMENT) REVERSED AS TO RESPONDENT, FRANCISCO OVID, ON COUNT V (TITLE VII) REVERSED AS TO THE RESPONDENT, MASS TRANSIT ADMINISTRATION, AND ON COUNTS VII (§ 1983) AND XII (MARYLAND CONSTITUTION) REVERSED AS TO THE RESPONDENTS, WADE MORAGNE-EL AND VERNON PARSONS; CASE REMANDED TO THE COURT OF SPECIAL APPEALS AS TO THOSE COUNTS AND RESPONDENTS WITH INSTRUCTIONS TO REMAND THIS ACTION AS TO THOSE COUNTS AND RESPONDENTS TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; AS TO ALL OTHER COUNTS, UNNUMBERED CLAIMS, AND PARTIES, THE JUDGMENT OF THE COURT OF SPECIAL APPEALS IS AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner appealed the Court of Special Appeals' (Maryland) judgment affirming the trial court's grant of respondents' motion to dismiss her amended complaint. The court granted certiorari review to assess the legal sufficiency of petitioner's allegations of false imprisonment, intentional infliction of emotional distress, and violations of 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1983, and Md. Const. Declaration of Rights art. 24.

OVERVIEW: Petitioner employee sued respondents, employer, co-worker, supervisors, and union officials, for sexual harassment. The trial court dismissed petitioner's amended complaint. The intermediate appellate court affirmed the trial court's decision, and petitioner appealed. The court granted petitioner's request for certiorari to assess the legal sufficiency of her allegations of false imprisonment, intentional infliction of emotional distress, and violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1983, and Md. Const. Declaration of Rights art. 24. The dismissal of petitioner's false imprisonment claim was reversed as to respondent co-worker, as respondent co-worker's conduct deprived petitioner of her liberty, without her consent, and without legal justification. The dismissal of petitioner's Title VII claim was reversed as to respondent employer, as respondent co-worker's conduct created a hostile work environment which was imputable to respondent employer. Finally, the dismissal of petitioner's § 1983 and Md. Const. Declaration of Rights art. 24 claims were reversed as to respondent supervisors.

OUTCOME: The judgment affirming the dismissal of petitioner's false imprisonment claim was reversed as to respondent co-worker. The judgment affirming the dismissal of petitioner's Title VII of the Civil Rights Act of 1964, as amended, claim was reversed as to respondent employer. The judgment affirming the dismissal of petitioner's equal protection claims under the federal and Maryland Constitutions was reversed as to respondent supervisors.

CORE TERMS: sexual harassment, retaliation, supervisor, outrageous, sex, severe, cause of action, harassment, false imprisonment, bus, equal protection clause, actionable, unlawful conduct, hostile, emotional distress, affirming, battery, prehearing, coworker, Fourteenth Amendment, gender discrimination, sex discrimination, equal protection, rape, severe emotional distress, medical treatment, abusive, infer, plead, intentional discrimination

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

[HN1] Md. R. Civ. P., Cir. Ct. 2-303(b) requires that each averment of a pleading shall be simple, concise, and direct and that it shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief. The rule further requires that a pleading shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

[HN2] In Maryland, contrary to federal practice, dismissals for failure to state a claim are not limited to those cases in which it appears beyond doubt that the plaintiff can prove no state of facts in support of his claim which would entitle him to relief. Instead, when drafting a Maryland circuit court complaint, it is the responsibility of counsel to distill from the client's narrative and any other relevant information acquired by investigation a concise statement of facts that will identify for the professional reader, be it adverse counsel or the court, the cause of action that is being asserted. That is the essence of thinking like a lawyer.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Motions to Dismiss

[HN3] Well pleaded allegations are accepted as true for purposes of the motion to dismiss. The inferences most favorable to the plaintiff are drawn from well pleaded facts. Any ambiguity or want of certainty in the allegations must be construed against the pleader.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN4] A factor in determining whether a hostile environment is sufficiently severe or pervasive to alter the conditions of the victim's employment, and thereby, to violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., is whether the discriminatory conduct unreasonably interferes with an employee's work performance.

Labor & Employment Law: Discrimination: Gender & Sex Discrimination: Other Laws

[HN5] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., makes it unlawful for an employer to discriminate against any individual with respect to her terms, conditions, or privileges of employment, because of such individual's sex. 42 U.S.C.S. § 2000e-2(a)(1).

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN6] The United States Supreme Court holds that the language of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C.S. § 2000e et seq., is not limited to economic or tangible discrimination, but that it encompasses protection for employees from hostile environment sex discrimination. The supreme court thereby endorses decisions of federal courts of appeals that hold that a claim of hostile environment sex discrimination is actionable under Title VII.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN7] To establish a claim for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., the plaintiff must prove the following four elements: (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN8] Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond the purview of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C.S. § 2000e et seq. In determining whether the alleged harassment of an employee is sufficiently severe or pervasive to bring it within Title VII's scope, a court must examine all the circumstances, including the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Labor & Employment Law: Discrimination: Retaliation

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

[HN9] To plead "retaliation" in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., the plaintiff must allege that: (1) she engaged in statutorily protected expression or activity; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action.

Labor & Employment Law: Discrimination: Retaliation

[HN10] Participation in internal investigations is "protected activity," covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., only when that investigation is in response to an Equal Employment Opportunity Commission (EEOC) notice of a charge of discrimination and where the employer is aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation.

Labor & Employment Law: Discrimination: Retaliation

[HN11] A retaliatory action does not rise to the level of an adverse employment action unless it constitutes an ultimate employment decision, which may include acts such as hiring, granting leave, discharging, promoting, and compensating. Actions that do not cause a change in salary, benefits, or responsibility generally are not considered adverse employment actions.

Labor & Employment Law: Discrimination: Retaliation

[HN12] A retaliation claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., requires an adverse employment action, which does not obtain where the plaintiff voluntarily resigns.

Labor & Employment Law: Discrimination: Retaliation

[HN13] The District of Columbia Circuit states that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. § 2000e et seq., does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN14] See 42 U.S.C.S. § 1983.

Constitutional Law: Equal Protection: Gender & Sex

[HN15] The equal protection component of U.S. Const. amend. V's Due Process Clause confers a federal constitutional right to be free from gender discrimination, unless it is substantially related to important governmental objectives. Deprivations of this right may be redressed by a damages remedy.

Constitutional Law: Equal Protection: Gender & Sex

[HN16] Federal courts of appeals hold that a constitutional equal protection claim of gender discrimination may be based on sexual harassment.

Constitutional Law: Equal Protection: Gender & Sex

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN17] A 42 U.S.C.S. § 1983 claim may be properly grounded on a violation of the Equal Protection Clause of U.S. Const. amend. XIV based on sexual harassment in the workplace.

Labor & Employment Law: Discrimination: Sexual Harassment: Other Laws

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN18] The Seventh Circuit states that the ultimate inquiry under 42 U.S.C.S. § 1983 is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C.S. § 2000e et seq., as to whether or not the sexual harassment altered the conditions of the victim's employment. That standard comes from the Equal Employment Opportunity Commission regulations promulgated under Title VII. A plaintiff can make an ultimate showing of sex discrimination either by showing that sexual harassment that is attributable to the employer under § 1983 amounted to intentional sex discrimination or by showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination. To make this showing, it is not necessary to show that all women employees are sexually harassed. Harassment of the plaintiff alone because of her sex is enough.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN19] In the context of a 42 U.S.C.S. § 1983 sexual harassment-hostile work environment claim against one or more supervisors of the harasser, the Fifth Circuit concludes that a supervisory official may be liable under § 1983 if that official, by action or inaction, demonstrates a deliberate indifference to a plaintiff's constitutionally protected rights. The "deliberate indifference" standard permits courts to separate omissions that amount to an intentional choice from those that are merely unintentionally negligent oversights.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN20] The standard adopted by the Second Circuit for 42 U.S.C.S. § 1983 liability on the part of a supervisor for co-worker sexual harassment is that liability can be imposed upon individual employers, or responsible supervisors, for failing to properly investigate and address allegations of sexual harassment when, through this failure, the conduct becomes an accepted custom or practice of the employer. The standard adopted by the Third Circuit is whether the evidence shows that the supervisor acquiesced in the sexual discrimination. The test applied by the Seventh Circuit is whether the sexual harassment occurred at the direction of the officials or with their express consent.

Labor & Employment Law: Discrimination: Sexual Harassment: Other Laws

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN21] Courts decline to find liability under 42 U.S.C.S. § 1983 against a co-employee for harassment when the harassment does not involve use of state authority or position.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN22] A state agency is not a "person" under 42 U.S.C.S. § 1983 and can have no § 1983 liability. An action for money damages under § 1983 cannot be maintained against a state, a state agency, or a state official sued in his official capacity.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN23] Joint liability theories cannot be utilized under 42 U.S.C.S. § 1983 to assert a money damages claim against a state agency when the state agency cannot be liable for damages if it were the sole defendant.

Constitutional Law: Bill of Rights

[HN24] See Md. Const. Declaration of Rights art. 24.

Constitutional Law: Equal Protection: Gender & Sex

[HN25] See Md. Const. Declaration of Rights art. 46.

Constitutional Law: Equal Protection

[HN26] The principle of equal protection of the laws is included in Md. Const. Declaration of Rights art. 24.

Constitutional Law: Equal Protection

[HN27] When evaluating an equal protection claim grounded on Md. Const. Declaration of Rights art. 24, the Court of Appeals of Maryland utilizes in large measure the basic analysis provided by the United States Supreme Court in interpreting the like provision contained in U.S. Const. amend. XIV. Although the equal protection clause of U.S. Const. amend. XIV and the equal protection principle embodied in Md. Const. Declaration of Rights art. 24 are "in pari materia," and decisions applying one provision are persuasive authority in cases involving the other, each provision is independent, and a violation of one is not necessarily a violation of the other.

Constitutional Law: Equal Protection: Scope of Protection

[HN28] One difference between the equal protection clause of U.S. Const. amend. XIV and the equal protection principle embodied in Md. Const. Declaration of Rights art. 24 concerns the remedy for a constitutional violation. The right of recovery for federal violations arises from statute-- 42 U.S.C.S. § 1983--whereas the redress for Maryland violations is through a common law action for damages.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

[HN29] Maryland has not adopted the federal dichotomy, under 42 U.S.C.S. § 1983, between officials acting in their official capacity versus their individual capacity. Instead, in Maryland, a public official who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages. This liability for damages resulting from unconstitutional acts is in no way based upon the "official/individual capacity" body of law which has developed in federal § 1983 claims. Liability has been imposed upon the government official when his unconstitutional actions were in accordance with or dictated by governmental policy or custom. Liability also has been imposed when the unconstitutional acts were inconsistent with governmental policy or custom. Moreover, liability has been imposed upon the official when he was acting in the scope of his employment.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN30] Maryland constitutional provisions have the more narrow focus of protecting citizens from certain unlawful acts committed by government officials.

Torts: Intentional Torts: False Imprisonment

[HN31] As a substantive matter, the necessary elements of a case for false imprisonment are a deprivation of the liberty of another without his consent and without legal justification.

Torts: Intentional Torts: False Imprisonment

[HN32] For purposes of false imprisonment, legal justification is the equivalent of legal authority.

Torts: Intentional Torts: False Imprisonment

[HN33] Any exercise of force, or threat of force, by which in fact the other person is deprived of his liberty and is compelled to remain where he does not wish to remain is an imprisonment.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN34] A claim of intentional infliction of emotional distress has four elements: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) the emotional distress must be severe. Each of these elements must be pled and proved with specificity.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN35] In many cases, the extreme and outrageous character of the defendant's conduct is in itself important evidence that the severe emotional distress existed.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN36] Previous Maryland cases indicate the high burden imposed by the requirement that a plaintiff's emotional distress be severe.

Torts: Intentional Torts: Intentional Infliction of Emotional Distress

[HN37] The severity of emotional distress is measured by factors including the intensity of the response as well as its duration.

Governments: Courts: Authority to Adjudicate

[HN38] See Md. R. App. Review, Ct. App. and Ct. Spec. App. 8-206(f).

Civil Procedure: Disclosure & Discovery

[HN39] Md. R. App. Review, Ct. App. and Ct. Spec. App. 8-206(b) prohibits parties from referring to information disclosed at a prehearing conference.

COUNSEL: ARGUED BY: Elizabeth Colette of Baltimore, MD, FOR PETITIONER.

ARGUED BY: Callista M. Freedman (Paul F. Newhouse of the Law Office of Paul F. Newhouse, on brief) of Towson, MD, FOR RESPONDENTS.

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

ARGUED BY: Paul D. Starr (H. Victoria Hedian of Abato, Rubenstein and Abato, P.A., on brief) of Baltimore, MD, FOR RESPONDENTS.

ARGUED BY: Kathleen J. Masterton, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General of Maryland, on brief) of Baltimore, MD, FOR RESONDENTS.

JUDGES: ARGUED BEFORE: Bell, C.J.; Eldridge, Rodowsky, Raker, Wilner, Cathell, and Harrell, JJ.

OPINIONBY: Rodowsky

OPINION: [**99] [*340]

Opinion by Rodowsky, J.

The petitioner, Jacqueline Manikhi (Manikhi), alleges that she was the victim of sexual harassment by a coworker that [*341] continued over a period of years. Undertaking to assert multiple theories of liability, she sued her employer, two supervisors, three union officials, and the coworker in the Circuit Court for Baltimore City. [***2] The issue before us is the legal sufficiency of the allegations in certain counts of an amended complaint.

The employer is the respondent, Mass Transit Administration (MTA), a unit of the Department of Transportation of the State of Maryland. The events with which we are concerned are said to have occurred at night at the MTA facility on Kirk Avenue near Twenty-fifth Street in Baltimore City where buses that are not in service are cleaned, refueled, and parked on a large, open air lot. The alleged harasser is Francisco "Roy" Ovid (Ovid), another respondent. Manikhi and Ovid were classified as "A-Cleaners" of buses; both worked the night shift at the Kirk Avenue facility. The respondents, Vernon Parsons (Parsons) and Wade Moragne-el (Moragne-el), collectively, the "MTA Officials," are alleged to have been, respectively, the foreman of the night shift at Kirk Avenue and, as of 1995, the chief superintendent of that facility. Charles Pettus, Ennis Fonder, and Nelson Zollicoffer, the remaining respondents, are officials of Local 1300 of the Amalgamated Transit Union, A.F. of L.-C.I.O., and they are collectively referred to as "the Union Officials." The complaint seeks compensatory and [***3]punitive damages and counsel fees. There is no specific request for prospective relief.

The only count that survived dismissal on the face of the pleadings in the circuit court was one charging battery by Ovid. It was tried to a jury and resulted in a judgment for the defendant, apparently based on Manikhi's failure to convince the jury that a battery had occurred within the one-year period of limitations for that tort. The Court of Special Appeals affirmed the dismissal. *Manikhi v. Mass Transit Admin.*, 127 Md. App. 497, 733 A.2d 372 (1999). We granted Manikhi's petition for certiorari. 356 Md. 495, 740 A.2d 613 (1999). This certiorari review concerns Manikhi's allegations of violations of Title VII of the Civil Rights Act of 1964, as [*342] [**100] amended, 42 U.S.C. § 2000e, n1 of 42 U.S.C. § 1983, and of Articles 24 and 40 of the Maryland Declaration of Rights, as well as counts labeled "False Imprisonment" and "Intentional Infliction of Emotional Distress." When discussing a particular claim, infra, we shall identify the respondents against whom the claim is asserted.

-----Footnotes-----

n1 By Public Law 92-261, 86 Stat. 103 (1972), Title VII was amended to include within the definition of "person" under 42 U.S.C. § 2000e(a), and hence of "employer," § 2000e(b), governments, governmental agencies, and political subdivisions.

-----End Footnotes-----

[***4]

Inasmuch as the instant appeal is from the grant of a motion to dismiss for insufficient allegations in a complaint, we would ordinarily proceed directly to summarizing those allegations before determining whether they "contain a clear statement of the facts necessary to constitute a cause of action." Maryland Rule 2-305. In the instant matter, however, there is a complication. Before we can determine whether the amended complaint states one or more causes of action,

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

we must first determine whether an affidavit by Manikhi, which she purported to incorporate into her amended complaint, forms part of that amended complaint.

I

The complaint initially filed by Manikhi was over sixty pages in length, consisting of 241 paragraphs. MTA moved to strike that complaint, arguing that it was "rambling" and constituted "an assemblage of opinions, argument, recitations of evidentiary minutiae, and extraneous allegations." Commenting that she had been unable to discern a cause of action alleged within the first forty pages of the complaint, the circuit court (Judge Bonita J. Dancy) dismissed, with leave to amend.

This dismissal was proper. [HN1] Maryland Rule 2-303(b) requires that "each averment[***5] of a pleading shall be simple, concise, and direct" and that it "shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief." The rule further requires that a pleading "shall not include argument, unnecessary recitals of law, [*343] evidence, or documents, or any immaterial, impertinent, or scandalous matter."

[HN2] In Maryland, contrary to federal practice, dismissals for failure to state a claim are not limited to those cases in which "it appears beyond doubt that the plaintiff can prove no state of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957) (footnote omitted). See J.A. Lynch, Jr. & R.W. Bourne, *Modern Maryland Civil Procedure* § 6.1, at 342-47 (1993) (distinguishing between pleading requirements in Maryland and federal practice); P.V. Niemeyer & L.M. Schuett, *Maryland Rules Commentary* 161 (2d ed. 1992) (same); P.M. Sandler & J.K. Archibald, *Pleading Causes of Action in Maryland* § 1.1, at 2 (2d ed. 1991) (same). Instead, when drafting a Maryland circuit court complaint, it is the responsibility of counsel to[***6] distill from the client's narrative and any other relevant information acquired by investigation a concise statement of facts that will identify for the professional reader, be it adverse counsel or the court, the cause of action that is being asserted. That is the essence of "thinking like a lawyer."

In her amended complaint Manikhi reduced the allegations to twenty-five pages and ninety-nine paragraphs. The amended complaint, however, expressly states that it incorporates by reference, as part of the complaint, the matters contained in an affidavit by Manikhi which is attached to the complaint. That affidavit, consisting of fifty pages and 185 paragraphs, substantially repeats the original complaint and precipitated another round of motions to strike and to dismiss. At the hearing on those motions the circuit court (Chief Judge Robert I.H. Hammerman) described the affidavit as a "regurgitation" [**101] of the original complaint and struck the affidavit from the amended complaint.

By a footnote in her brief to the Court of Special Appeals Manikhi submitted that the affidavit materials were properly incorporated into the amended complaint. Ruling that Manikhi's footnote argument did not[***7] address the basis of the circuit [*344] court's ruling--violation of Rule 2-303(b)--the Court of Special Appeals considered Manikhi to have waived any issue concerning the striking of the affidavit. *Manikhi*, 127 Md. App. at 509, 733 A.2d at 379. That court decided the appeal to it on the basis of the amended complaint, unenhanced by the contents of the affidavit. In her brief to this Court, Manikhi asks us to consider that the affidavit forms part of the amended complaint.

The circuit court did not err in striking the affidavit from the amended complaint. Incorporating the subject affidavit into the amended complaint made the amended complaint substantially indistinguishable from the original complaint. We have already held that the original complaint was properly dismissed, with leave to amend. Manikhi chose not to suffer judgment on the original complaint, but to amend. The incorporation stratagem is an effort to have it both ways. There was no abuse of discretion in striking the affidavit from the amended complaint, inasmuch as the incorporation stratagem seems clearly to have been designed to attempt to circumvent the trial court's ruling on the original complaint. [***8]

II

The amended complaint consists of an introductory statement followed by separately numbered counts, many of which state additional facts. Each count incorporates the preceding and succeeding allegations. In most instances there is no effort to state when conduct or events occurred.

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

When setting forth below the material allegations of the amended complaint, we are mindful of the following rules:

[HN3] 1. Well pleaded allegations are accepted as true for purposes of the motion to dismiss, *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768, 511 A.2d 492, 499-500 (1986);

2. The inferences most favorable to the plaintiff are drawn from well pleaded facts, *id.*; and

[*345] 3. "Any ambiguity or want of certainty in [the] allegations must be construed against the pleader." *Read Drug & Chem. Co. v. Colwill Constr. Co.*, 250 Md. 406, 416, 243 A.2d 548, 555 (1968).

Manikhi was first employed by MTA in 1989. She transferred to the Kirk Avenue facility in 1991. There she was subjected to repeated sexual harassment by Ovid. This abuse continued throughout 1991, 1992, 1994, and 1995. During 1993 Manikhi transferred to MTA's Eastern Avenue facility in[***9] order to escape Ovid's conduct. For reasons that are unexplained in the complaint, Manikhi transferred back to Kirk Avenue in 1994. On October 11, 1995, Ovid elbowed Manikhi and called her a "bitch." From Manikhi's standpoint this was "the last straw." On or about October 13, 1995, Manikhi filed a sexual harassment complaint with MTA's internal equal employment opportunity (EEO) office. That complaint "was resolved in her favor" by the MTA-EEO on December 8, 1995. Manikhi further alleges:

"20. Even after the December 8, 1995, favorable EEO finding for Ms. Manikhi, Defendants did not take any measures to protect her from Defendant Ovid.

"21. Ultimately, in order to get away from unlawful conduct against her, in 1996, Ms. Manikhi was forced to transfer to Northwest Division where she finally had to move to a B-Cleaner position, a lower position, which allows her to work alone.

"22. In or about August 1996, Defendant Ovid was criminally convicted [**102]of committing continuous harassment against [Manikhi] (which was reduced to a [probation before judgment] after he attended counseling), but--as they have from the beginning--Defendants have continually refused to believe [Manikhi] or[***10] protect her from Ovid, rather they have done everything they can to protect Defendant Ovid."

The allegations describing Ovid's sexually abusive conduct are graphic. They sufficiently allege persistent and unwelcome sexual harassment by Ovid. He is said to have exposed [*346] himself, grabbed her breasts, thrust his pelvic area against her in close quarters, importuned her to have sex with him, and threatened to follow her home and have forced sex with her. Ovid and Manikhi are African-American, while Manikhi's husband is a native of the Middle East. One of Ovid's recurring themes was that Manikhi craved sex with a black man.

Principal issues in this case are whether MTA Officials had actual or constructive notice of the sexual harassment prior to October 1995, and whether, after having notice, they failed to protect Manikhi from Ovid. The Court of Special Appeals held that there was no sufficient allegation of notice prior to the formal complaint of October 1995 and that there was no sufficient allegation that the sexual harassment continued after the favorable disposition on December 8 of the MTA-EEO investigation. *Manikhi*, 127 Md. App. at 516-20, 733 A.2d at 383-85.[***11] We disagree. Taking as true the alleged facts set forth below, there was notice to MTA prior to October 1995.

Manikhi made "complaints" about Ovid to one Reed Kreider, described as Manikhi's "prior supervisor" and the predecessor to Moragne-el as chief supervisor at the Kirk Avenue facility. As noted, Moragne-el did not become a supervisor until 1995. The inference is that these "complaints" were of sexual harassment. n2 Further, Manikhi's "complaints about Ovid's unlawful conduct were ignored by MTA supervisors Parsons and Moragne-el."

-----Footnotes-----

n2 These allegations are found in P 43 of the amended complaint in which Manikhi asserts a similarity between the unresponsiveness of Moragne-el with that of Kreider. The complaints to Moragne-el are clearly about sexual harassment, although the clearest allegations of such complaints to Moragne-el are after October 11, 1995.

-----End Footnotes-----

Inferentially at a time prior to October 13, 1995, Manikhi went to one Saunders, also an alleged foreman, who advised her that she could not file a grievance[***12] against Ovid, as another member of the union. Manikhi told Saunders that "she was tired of Defendant Ovid bothering her and asked if [*347]there was anything else she could do to make him leave her alone." In response Saunders furnished Manikhi with a paper that said "something about [one] employee cannot stop another employee from doing their job." [HN4] A factor in determining whether a hostile environment is sufficiently severe or pervasive to alter the conditions of the victim's employment, and thereby to violate Title VII, is whether the discriminatory conduct "unreasonably interferes with an employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662, 676 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295, 302-03 (1993)). Accordingly, the most favorable inference to Manikhi from the description of the paper furnished to her by her foreman, Saunders, is that Saunders understood that Manikhi was complaining of sexual harassment.

Manikhi also avers that on one occasion she was in the room used for lunch breaks and crying as a result of some[***13] conduct by Ovid that is not described. Parsons "came in smiling, and jokingly said 'did your boyfriend [] Ovid do something to upset you?'" Manikhi yelled that Ovid was not her boyfriend and said to Parsons, "'You let Ovid do anything he wants to do. I just want him to leave me alone.'" The [**103] allegation that Parsons, who did not see the cause of Manikhi's crying, was able to associate it with Ovid, to whom Parsons facetiously referred as Manikhi's boyfriend, also carries the inference of unwelcome conduct based on Manikhi's gender. In the same vein is Manikhi's averment that Parsons, "smiling and grinning," asked Manikhi if she were "peeping or spying" on Ovid who, Parsons said, had told him that that was the fact of the matter. Manikhi denied her having so acted.

Additional allegations of the amended complaint will be set forth, *infra*, when we discuss the rulings on certain of the counts which Manikhi raises before us.

III

Manikhi charged MTA with violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, [*348] based on "discriminatory harassment/hostile work environment" (Count V) and "retaliation" (Count VI).

A

[HN5] Title VII makes[***14] it unlawful for an employer "to discriminate against any individual with respect to [her] ... terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), [HN6] the United States Supreme Court held that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination," but that it encompasses protection for employees from hostile environment sex discrimination. *Id.* at 64, 106 S. Ct. at 2404, 91 L. Ed. 2d at 58. The Court thereby endorsed decisions of federal courts of appeals that had held that a claim of hostile environment sex discrimination is actionable under Title VII. *Id.* at 66-67, 106 S. Ct. at 2405, 91 L. Ed. 2d at 59.

[HN7] To establish a claim for sexual harassment under this provision the plaintiff must prove the following four elements:

"(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive[***15] work environment; and (4) it was imputable on some factual basis to the employer."

See *Spicer v. Virginia Dep't of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995).

[HN8] "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295, 302 (1993). In determining whether the alleged harassment of an employee is sufficiently severe or pervasive to bring it within Title VII's scope, a court must examine

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

"all the circumstances, [including] the frequency of the discriminatory conduct, its severity; whether it is physically threatening or [*349] humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) (quoting *Harris*, 510 U.S. at 23, 114 S. Ct. at 371, 126 L. Ed. 2d at 302-03).

In the instant matter the conduct attributed to Ovid clearly satisfies the first three elements of a hostile[***16] environment violation of Title VII. For the reasons stated in Part II, *supra*, the fourth element of the violation is satisfied. Accordingly, Count V states a cause of action.

B

[HN9] To plead "retaliation" in violation of Title VII the plaintiff must allege that

"(1) she engaged in statutorily protected expression or activity; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the [**104] protected expression and the adverse action."

Knox v. Indiana, 93 F.3d 1327, 1333-34 (7th Cir. 1996); see also *Munday v. Waste Mgt. of N.A., Inc.*, 126 F.3d 239, 242 (4th Cir. 1997) (same), cert. denied, 522 U.S. 1116, 118 S. Ct. 1053, 140 L. Ed. 2d 116 (1998).

We shall assume that Manikhi's filing of an internal complaint was a "protected activity." Compare *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) [HN10] (participation in internal investigations is covered by Title VII only when that investigation is "in response to [an EEOC] notice of charge of discrimination" and where the employer is "aware that the evidence gathered in that inquiry will be considered by the EEOC[***17] as part of its investigation"), with D.E. Larkin, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 Ga. L. Rev. 1181, 1187 (1999) (arguing that "courts should liberally construe" Title VII because "a restrictive reading of the anti-retaliation provision has a crushing impact on employees filing internal complaints and participating in internal investigations"). On that assumption, the first element [*350] is satisfied. Manikhi seems to rely on what we might call a "constructive demotion" theory to satisfy the second and third elements of a retaliation violation of Title VII. The Court of Special Appeals concluded, however, that Manikhi did not plead a "retaliation" claim under Title VII because she did not plead these two elements, i.e., that "she [did] not allege that the MTA took an adverse employment action against her" and she "failed to allege a causal connection between a protected activity and an adverse employment action." *Manikhi*, 127 Md. App. at 520-21 & n.10, 733 A.2d at 385 & n.10.

[HN11] A "retaliatory action" does not rise to the level of an "adverse employment action" [***18] unless it constitutes an "ultimate employment decision" which may include acts "such as hiring, granting leave, discharging, promoting, and compensating." See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.) (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892, 102 S. Ct. 388, 70 L. Ed. 2d 206 (1981)), cert. denied, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997). "Actions that do not cause a change in salary, benefits or responsibility generally are not considered adverse employment actions." A.C. Modjeska, *Employment Discrimination Law* § 1:04, at 13 (3d ed. 1999).

In *Munday*, 126 F.3d 239, the Fourth Circuit considered a case where an employee voluntarily resigned after being yelled at repeatedly by her employer and after her employer told other employees to ignore her and to spy on her. Although the employee felt compelled to quit, the court nonetheless held that the employer's acts did not amount to retaliation "because there was no adverse employment action." *Id.* at 243.[***19] There, the court said:

"We agree with the defendants that, as a matter of law, this scenario does not rise to the level of an adverse employment action for Title VII purposes. In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged [*351] in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (*Hopkins* was not discharged from employment, and the comments in question were not and did not result in any adverse employment action); *DiMeglio v. Haines*, 45 F.3d 790, 804 & n.6 (4th Cir. 1995) (a reprimand and reassignment may constitute an adverse employment action); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985) (the Age Discrimination in

360 Md. 333, *; 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

Employment Act "affords no protection unless there has been [**105] some adverse employment action by the employer. Because Bristow was not actually discharged, he relies on a theory of constructive discharge."), cert. denied, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986);[***20] *Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985) [HN12] (Title VII retaliation claim requires adverse employment action, which does not obtain where plaintiff voluntarily resigns)."

Id.

In *Jensvold v. Shalala*, 829 F. Supp. 131 (D. Md. 1993), however, the court considered a case where the employer gave routine tasks to a researcher and denied her opportunities to publish. The court held that these were not "interlocutory or mediate decisions," but rather qualified as adverse employment action. Id. at 136-37 (quoting Page, 645 F.2d at 233). Relying on cases from other circuits, the Jensvold court said:

"As [HN13] the D.C. Circuit stated in *Passer v. American Chemical Society*, 290 U.S. App. D.C. 156, 935 F.2d 322 (D.C. Cir. 1991), Title VII 'does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.' 935 F.2d at 331; see also *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990) (failure to provide job references could state[***21] valid Title VII retaliation claim); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1532 (11th Cir. 1989) (unlawful retaliation to persuade new employer to fire employee); *Passer*, 935 F.2d at 331-32 (cancellation of seminar honoring former employee, which humiliated him and made [*352] it more difficult for him to procure future employment, actionable under Title VII).

"The Court finds that the allegedly retaliatory actions described supra, which include alleged attempts to undermine plaintiff's ability to attain a guest researcher position with Dr. Putnam, are sufficient to support a Title VII retaliation claim. Accordingly, the Court will deny defendant's motion for summary judgment with respect to plaintiff's retaliation claim."

829 F. Supp. at 140.

Here, the allegations of Manikhi's complaint that are critical to her retaliation theory state:

"Ultimately, in order to get away from unlawful conduct against her, in 1996, Ms. Manikhi was forced to transfer to Northwest Division where she finally had to move to a B-Cleaner position, a lower position, which allows her to work alone."

These allegations are ambiguous. Although Manikhi alleges that she was [***22]"forced to transfer" out of Kirk Avenue in order to escape "unlawful conduct," no facts are alleged that tie the forced transfer to retaliation for filing the MTA-EEO complaint. The "unlawful conduct" referred to could well be a continuation of the previous unlawful conduct without any causal connection to the internal complaint. This would not be a retaliation violation, but it would be actionable under Count V of the complaint which we have sustained in Part III.A, supra.

Further, even if one could infer that the "unlawful conduct" is retaliatory, that allegation is contradicted by the allegation that Manikhi sought the B-Cleaner position because it "allowed her to work alone." Construing the ambiguity against the pleader results in the absence of any allegation of adverse employment action. Under that reading the demotion was voluntary. This reading is supported by the ambiguity in the allegations concerning the timing of the transfer and the timing of the demotion that is created by the adverb, "finally." One fair reading is that Manikhi transferred to the Northwest [*353]Division and, after some period of service as an A-Cleaner, then moved to a B-Cleaner position in order to work[***23] alone. Under that reading, there is no adverse employment action and no retaliation.

[**106] For these reasons Count VI of the complaint was properly dismissed.

IV

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

In Count VII of her amended complaint Manikhi sues Ovid and the Union and MTA Officials, "acting in their individual capacities under color of state law," for violation of 42 U.S.C. § 1983. n3 We conclude, for the reasons stated below, that a § 1983 claim is stated only against the MTA Officials.

-----Footnotes-----

n3 [HN14] In relevant part § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects ... any citizen ... or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"

-----End Footnotes-----

In *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), the United States Supreme Court held that [HN15] the "equal protection component of the [Fifth Amendment's] [***24] Due Process Clause ... confers ... a federal constitutional right to be free from gender discrimination," unless it is substantially related to important governmental objectives. *Id.* at 235, 99 S. Ct. at 2271, 60 L. Ed. 2d at 856. The Court also held that deprivations of this right "may be redressed by a damages remedy." *Id.* at 249, 99 S. Ct. at 2279, 60 L. Ed. 2d at 865. n4 See *Ritchie v. Donnelly*, 324 Md. 344, 351 n.2, 597 A.2d 432, 435 n.2 (1991) (discussing § 1983 claim alleging gender based discriminatory discharge of deputy sheriff, but noting that legal sufficiency of factual allegations was not challenged).

-----Footnotes-----

n4 The gender discrimination at issue in *Davis* was a congressman's decision to fire his deputy administrative assistant because, as he stated in a letter to her, "it was essential that the understudy to my Administrative Assistant be a man." 442 U.S. at 230-31 n.3, 99 S. Ct. at 2269 n.3, 60 L. Ed. 2d at 853 n.3.

-----End Footnotes-----

[*354]

Since *Davis*, [HN16] federal[***25] courts of appeals have held that a constitutional equal protection claim of gender discrimination may be based on sexual harassment. See *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997) ("Sex discrimination and sexual harassment in public employment violate the Equal Protection Clause of the Fourteenth Amendment."); *Cross v. Alabama, State Dep't of Mental Health*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (affirming as based on sufficient evidence jury's finding of liability in § 1983 sexual harassment claim); *Noland v. McAdoo*, 39 F.3d 269, 271 (10th Cir. 1994) ("An allegation of sexual harassment is actionable under § 1983 as a violation of the Equal Protection Clause."); *Beardsley v. Webb*, 30 F.3d at 529 (noting that "courts have held that intentional sexual harassment of employees by persons acting under color of state law violates the Fourteenth Amendment and is actionable under § 1983"); *Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994) [HN17] ("[A] § 1983 claim may be properly grounded on a violation of the Equal Protection Clause of the Fourteenth Amendment[***26] based on sexual harassment in the workplace."); *Bouman v. Block*, 940 F.2d 1211, 1230-32 (9th Cir.) (discussing municipal liability under § 1983 sexual harassment claim), cert. denied, 502 U.S. 1005, 112 S. Ct. 640, 116 L. Ed. 2d 658 (1991); *Pontarelli v. Stone*, 930 F.2d 104, 113 (1st Cir. 1991) ("Sex-based discrimination, including sexual harassment, is actionable under 42 U.S.C. § 1983 as a violation of the equal protection clause."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) ("To prove sexual discrimination [under § 1983], a plaintiff must show that any disparate treatment was based upon her gender."); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988) (setting forth the standards for "what constitutes sexual harassment and sex discrimination under § 1983 and the equal protection clause").

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

A principal distinction between a Title VII action and one under § 1983 was addressed in *Bohen v. City of East Chicago*, [****107**] *Indiana*, 799 F.2d 1180 (7th Cir. 1986), where the court noted that "the core of any equal protection case is, of course, [*****27**] a showing of intentional discrimination." *Id.* at 1186. Thus, the court reasoned that [HN18]

[***355**] "the ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment. That standard comes from the [EEOC] regulations promulgated under Title VII. Second, a plaintiff can make an ultimate showing of sex discrimination either by showing that sexual harassment that is attributable to the employer under § 1983 amounted to intentional sex discrimination or by showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination. To make this showing, it is not necessary to show that all women employees are sexually harassed. Harassment of the plaintiff alone because of her sex is enough."

799 F.2d at 1187 (citations omitted). n5

-----Footnotes-----

n5 For the requirement to show intent, see also *Bator v. Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994) (noting that "a plaintiff must show intentional discrimination . . . for equal protection claims (but not for Title VII claims)"); *Beardsley*, 30 F.3d at 529 (noting that "courts have held that intentional sexual harassment of employees by persons acting under color of state law violates the Fourteenth Amendment and is actionable under § 1983").

-----End Footnotes-----

[*****28**]

In a concurring opinion, Judge Posner elaborated on how such a "conscious failure" can amount to the intent-to-discriminate required to prove an equal protection violation. He reasoned that

"a policy of never responding to complaints about sexual harassment can ... be analogized to a police department's policy of never responding to complaints of rape. Such a policy would violate the equal protection clause if no effort were made to justify the policy; it would not be saved by pointing out that men sometimes rape other men and that (depending on the specific wording of a state's rape law) a woman might in principle rape a man."

799 F.2d at 1190 (Posner, J., concurring). See also *Trautvetter v. Quick*, 916 F.2d 1140, 1149-51 (7th Cir. 1990) (discussing *Bohen* and intent-to-discriminate).

[***356**]

Other federal circuit courts of appeals have addressed the issue of intent [HN19] in the context of a § 1983 sexual harassment-hostile work environment claim against one or more supervisors of the harasser. The Fifth Circuit concluded in this context "that a supervisory official may be liable under section 1983 if that official, by action or inaction, demonstrates a deliberate [*****29**] indifference to a plaintiff's constitutionally protected rights." *Southard*, 114 F.3d at 551. The court explained that "the 'deliberate indifference' standard permits courts to separate omissions that 'amount to an intentional choice' from those that are merely 'unintentionally negligent oversights.'" *Id.* (quoting *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 756 (5th Cir. 1993) (further attribution omitted)). *Gierlinger*, 15 F.3d 32, involved the harassment of a female state trooper by her coworkers. She sued her former commander under § 1983. [HN20] The standard adopted by the Second Circuit was that "liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure, the conduct becomes an accepted custom or practice of the employer." *Id.* at 34. The standard adopted by the Third Circuit in *Andrews*, 895 F.2d 1469, for § 1983 liability on the part of a supervisor for coworker sexual harassment is whether the evidence shows that the supervisor "acquiesced in the sexual discrimination." [*****30**] *Id.* at 1479. In *Volk*, 845 F.2d 1422, the test applied by the Seventh Circuit was whether the sexual harassment "occurred at the direction of these officials [****108**] or with their express consent." *Id.* at 1432 (citation and attribution omitted).

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the plaintiff, a woman physician-resident, sued the supervisors of her residency program for sexual harassment perpetrated by male residents not made parties to the suit. The court stated that the plaintiff could meet the requisite element of "discriminatory intent" by showing that the supervisors' "action or inaction was 'affirmatively linked' to that [harassing] behavior in the sense that it could be characterized [*357] as 'supervisory encouragement, condonation, or acquiescence' or 'gross negligence amounting to deliberate indifference.'" Id. at 896, 902 (citation omitted; quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 804 (1985)). In reversing summary judgment for the defendants, the First Circuit found that the plaintiff presented[***31] sufficient evidence from which to infer this affirmative link based on the supervisors' "failure . . . to investigate and put a stop to the harassment," and their reliance on the male residents' version of events despite "good reason to suspect [that their version was a] pretext." Id. at 903.

A

In the instant matter, giving to Manikhi the favorable inferences from the jumbled facts alleged in the amended complaint, there emerges the image of sexual harassment and a hostile workplace environment of which the MTA Officials should have been aware. The theme of Manikhi's allegations is that the MTA Officials would not protect her and that they did all that they could to protect Ovid. For example, in a conversation between Manikhi and Moragne-el that apparently took place after the October 1995 formal complaint, Moragne-el advised Manikhi that he had spoken with Ovid and concluded that Manikhi had been harassing Ovid because Ovid had refused to have sex with Manikhi. She further avers that, in that same conversation, she hypothesized to Moragne-el that she had been beaten and raped by Ovid in the Kirk Avenue bus parking area and that, bruised in face and body, she reported[***32] the incident to Moragne-el. She further hypothesized that Ovid told Moragne-el that there had been sex, but it was consensual. Manikhi avers that Moragne-el responded to the hypothetical by saying that no rape would have occurred.

Manikhi also avers that a few days after her formal complaint Moragne-el "yelled" at her in the presence of Ovid and Parsons. He told her to resolve her differences with Ovid or she would be terminated. When Manikhi responded by telling Moragne-el of the specific types of physical sexual abuse to which she had been subjected by Ovid, Moragne-el again told her that she should reconcile her differences with Ovid or she [*358] would be fired. Moragne-el is also alleged to have told Manikhi that he did not care what her coworkers had witnessed and that "their word means nothing."

The complaint further alleges that Manikhi had filed a criminal complaint against Ovid. A trial that was set for November 16, 1995, was postponed. Manikhi alleges that Moragne-el wrote in a letter dated December 15, 1995, that the case was "thrown out" because it was "not based upon any merit or substance." He "claimed [that] the legal resolution from the court was for her to stop [***33]her harassment of" Ovid.

The amended complaint also avers that when Manikhi told Moragne-el that she "would go outside the gates of MTA to seek justice," Parsons told her that she would "do no such thing." He said that "this was his base and he makes the decisions, and his decision for her is to stop harassing ... Ovid for sex."

In light of the allegations reviewed above and in Part II, *supra*, the amended complaint is legally sufficient for at least three reasons. First, as noted in Part II, Manikhi alleges actual notice to Moragne-el's [**109] predecessor as superintendent of the facility, and evidence of the above incidents would demonstrate a failure by the MTA Officials to protect Manikhi from further abuse. Second, the vehemence and intransigence of Moragne-el's alleged rejection of Manikhi's complaints, both during the pendency of the MTA-EEO investigation, and after its conclusion in Manikhi's favor, permit an inference of a sexually discriminatory and hostile work environment that was at least condoned at the level of state agents acting under color of law. Third, after the resolution of the MTA-EEO complaint, the MTA Officials continually refused to protect Manikhi from[***34] Ovid. She specifically alleges that after the MTA-EEO investigation she was promised that she would be "closely monitored," but she was not. Inferentially, monitoring would be done by Parsons, the immediate supervisor of Manikhi and Ovid.

For the foregoing reasons Count VII states a claim upon which relief can be granted against Moragne-el and Parsons.

[*359]

B

No cause of action, however, lies against Ovid based on § 1983. Ovid was an A-Cleaner, as was Manikhi. He had no control or authority over her. His alleged actions were not under color of state law. See *Woodward v. City of Worland*, 977 F.2d 1392, 1400-01 (10th Cir. 1992) (citing cases [HN21] "declining to find liability under § 1983 against a co-employee for harassment when the harassment did not involve use of state authority or position"), cert. denied, 509 U.S. 923, 113 S. Ct. 3038, 125 L. Ed. 2d 724 (1993).

C

With respect to the Union Officials, Manikhi recognizes that they are private individuals who would not ordinarily be liable under § 1983. Manikhi argues, however, that the Union Officials acted in concert with, or conspired with, or aided and abetted, the MTA Officials in depriving Manikhi[***35] of her constitutional right to be protected from gender discrimination. We find that the allegations of the amended complaint fail to present well pleaded facts in support of that theory. Indeed, on this phase of the case, the allegations are vague, confused, and extremely ambiguous.

In her brief to this Court, Manikhi places principal reliance on a meeting between the Union Officials and her following the October 11, 1995 incident when Ovid elbowed Manikhi. She alleged that, over a period of three hours, the Union Officials tried to dissuade her from charging that Ovid had elbowed her and that he had been sexually harassing her. The Union Officials appealed to solidarity (Ovid was a "union brother"), to racial identification (Manikhi was a "black sister"), and to sympathy (Ovid was an old man who could lose his pension). The Union Officials told her that if she would do this "then the charges would be reduced to two coworkers having a disagreement." Although Manikhi "insisted that she wanted a hearing," the Union Officials "did not properly process her grievance." She alleges that the decision not to have a hearing was made jointly by the Union and MTA [*360] Officials who agreed "that[***36] Ms. Manikhi would lose a day's work."

These allegations confuse Manikhi's complaint of sexual harassment by Ovid, which was resolved in her favor, with what we infer to be the settlement by the Union Officials of a disciplinary matter arising out of the altercation with Ovid on October 11. That the Union was motivated in effecting the grievance settlement by the desire to protect Ovid's job security was entirely consistent with the union's acting as an adversary to, and not in collusion with, management. One cannot infer from the grievance settlement that the Union Officials were acting in concert with the MTA Officials to deprive Manikhi of protection against sexual harassment when Manikhi alleges that her sexual harassment complaint was resolved in her favor.

[**110] For these reasons we affirm the dismissal as to the Union Officials of Count III (Aiding and Abetting), Count IV (Civil Conspiracy), and Count VII (§ 1983). n6

-----Footnotes-----

n6 It was improper pleading to allege aiding and abetting and conspiracy in separate counts of the amended complaint, as if they were causes of action independent of an underlying tort. "'Conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs.*, 336 Md. 635, 645 n.8, 650 A.2d 260, 265 n.8 (1994). Further, to have aider and abettor liability there must be a direct perpetrator of the tort. "Thus, civil aider and abettor liability, somewhat like civil conspiracy, requires that there exist underlying tortious activity in order for the alleged aider and abettor to be held liable." *Alleco Inc. v. Harry & Jeanette Weinberg Found.*, 340 Md. 176, 201, 665 A.2d 1038, 1050 (1995). The underlying tort is the cause of action that should be set forth in a separate count. The alleged aiders, abettors, and co-conspirators are simply additional parties jointly liable with the principal perpetrator.

-----End Footnotes-----

[***37]

D

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

In her conspiracy and her aiding and abetting "counts" Manikhi names MTA as a defendant. MTA is [HN22] a state agency and, as such, is not a "person" under § 1983 and can have no § 1983 liability. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, [*361] 58 (1989). As this Court has noted before, "an action for money damages under § 1983 cannot be maintained against a state, a state agency, or a state official sued in his official capacity." *Ritchie*, 324 Md. at 355, 597 A.2d at 437; see also *Okwa v. Harper*, 360 Md. 161, 192, 757 A.2d 118, 135 (2000) [No. 129, Sept. Term, 1999, filed July 28, 2000] (addressing § 1983 liability for Maryland Transportation Authority police officers). It is therefore unnecessary for us to enter the bog of whether an agency can conspire with, or aid and abet, its own agents under the facts alleged here. We hold simply that [HN23] joint liability theories cannot be utilized under § 1983 to assert a money damages claim against a state agency when the state agency cannot be liable for damages if it were the sole defendant.

V

Manikhi also claims under Article 24 of the Maryland Declaration of Rights. [***38]n7 Named as defendants in the Maryland Constitution count (Count XII) are Ovid and the Union and MTA Officials.

-----Footnotes-----

n7 [HN24] Article 24 of the Maryland Declaration of Rights reads:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

Manikhi further asserts deprivation of her right of free speech as guaranteed by Article 40 of the Declaration of Rights, but no facts are alleged that support that claim.

No claim is asserted that Article 46 of the Maryland Declaration of Rights has been violated. [HN25] That article provides that "equality of rights under the law shall not be abridged or denied because of sex."

-----End Footnotes-----

This Court has held that [HN26] "the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights." *Board of Supervisors v. Goodsell*, 284 Md. 279, 293 n.7, 396 A.2d 1033, 1040 n.7 (1979). [***39]The relation between the constitutions of the two sovereigns was stated in *Attorney General v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981), where we said:

[HN27] "When evaluating an equal protection claim grounded on Article 24, we utilize in large measure the basic analysis [*362] provided by the United States Supreme Court in interpreting the like provision contained in the fourteenth amendment. ... Although the equal protection clause of the fourteenth amendment and the equal protection principle embodied in Article 24 are 'in pari materia,' and decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of [**111] one is not necessarily a violation of the other."

Id. at 714, 426 A.2d at 946.

[HN28] One difference between the provisions concerns the remedy for a constitutional violation. "The right of recovery for Federal violations arises from statute-- § 1983--whereas the redress for State violations is through a common law action for damages." *DiPino v. Davis*, 354 Md. 18, 50, 729 A.2d 354, 371 (1999) (citing *Ashton v. Brown*, 339 Md. 70, 100, 660 A.2d 447, 462 (1995)). [***40] [HN29] This Court also has not adopted the federal dichotomy, under § 1983, between officials acting in their official capacity versus their individual capacity. Instead, in Maryland,

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

"a public official who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages. This liability for damages resulting from unconstitutional acts is in no way based upon the 'official/individual capacity' body of law which had developed in federal § 1983 claims. Liability has been imposed upon the government official when his unconstitutional actions were in accordance with or dictated by governmental policy or custom. Liability also has been imposed when the unconstitutional acts were inconsistent with governmental policy or custom. Moreover, ... liability has been imposed upon the official when he was acting in the scope of his employment."

Ritchie, 324 Md. at 370-71, 597 A.2d at 445 (citations omitted).

A

The amended complaint states a claim against the MTA Officials for violation of Article 24. In Ritchie, supra, [*363] we sustained a claim of gender discrimination in public employment that was based on both[***41] Articles 24 and 46 of the Maryland Declaration of Rights. In view of the strong public policy that is declared in Article 46, see note 9, supra, we hold that the equal protection component of Article 24, standing alone, embraces a prohibition against gender based discrimination in public employment at least to the extent found in the Fourteenth Amendment to the United States. Inasmuch as we have already held in Part IV.A that a case has been stated against the MTA Officials under § 1983, a case likewise has been stated under Article 24 against them in Count XII.

B

Manikhi's state constitutional claim against the Union Officials was properly dismissed. We stated in DiPino, 354 Md. at 50-51, 729 A.2d at 371, that [HN30] Maryland "Constitutional provisions have the more narrow focus of protecting citizens from certain unlawful acts committed by government officials. Indeed, only government agents can commit these kinds of Constitutional transgressions." (Emphasis added). The defendants in our prior constitutional tort cases have been public officials. The Court of Special Appeals, noting this fact, cited the following cases:

"See DiPino, [354 Md.] at 23, 729 A.2d 354[***42] (local police officer); Brown, 339 Md. at 102-04, 660 A.2d 447 (local police officers); Ritchie, 324 Md. at 349, 597 A.2d 432 (Sheriff of Howard County); Clea [v. City of Baltimore], 312 Md. [662,] 664-65, 541 A.2d 1303 [(1988)] (Baltimore City Police Officer); Widgeon [v. Eastern Shore Hosp. Ctr.], 300 Md. [520,] 523, 534, 479 A.2d 921 [(1984)] (doctors employed by the State of Maryland who concluded that plaintiff suffered from a mental disorder and committed him to a hospital); Mason v. Wrightson, 205 Md. 481, 485, 109 A.2d 128 (1954) (Baltimore City Police Sergeant); Heinze v. Murphy, 180 Md. 423, 425, 24 A.2d 917 (1942) (Baltimore City Police Officer); [Weyler v.] Gibson, 110 Md. [636,] 653-54, 73 A. 261 [(1909)] (Warden of the Maryland Penitentiary)."

[*364] Manikhi, 127 Md. App. at 525-26, 733 A.2d at 388. To this list may be added Okwa v. [**112] Harper, supra (police officers of Maryland Transportation Authority). Because the Union Officials are not "public officials" or "government agents," but instead are individuals who represent employees[***43] under the collective bargaining agreement with MTA, their alleged misconduct cannot be comprehended by a constitutional tort.

C

The constitutional tort count of the amended complaint was also properly dismissed as to Ovid, who is not a public official. See Part IV.B.

VI

In the false imprisonment count of her amended complaint (Count II), Manikhi sues only Ovid. She avers that Ovid committed the tort on numerous occasions after March 1994. We need only find that one of the specific illustrations alleged by her is legally sufficient in order to sustain the count.

Manikhi avers that Ovid would get on a bus where she was working, turn off the lights, and lock the back door, "trapping her in the stairwell of the bus." Ovid would go to the back of the bus "and stand as close as he could get to

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

her." "Ovid would tell her that he's tired of waiting for her to give" him sex. Ovid would tell her that, inasmuch as she was trapped in the stairwell, she might as well do what he told her, which is graphically described.

The Court of Special Appeals, in affirming the dismissal of this count, said that Manikhi

"does not allege that on any particular occasion Ovid unlawfully deprived her [***44] of her liberty, without consent. It is insufficient that on one occasion he allegedly told her she could not get away."

Manikhi, 127 Md. App. at 531, 733 A.2d at 391.

In this Court, Manikhi emphasizes those allegations in her complaint that relate to Ovid's physical efforts to block Manikhi's [*365] egress from the bus on which she was working, as distinct from the Court of Special Appeals' apparent emphasis on Ovid's verbal statement that she was trapped.

Ovid, by contrast, argues that Manikhi's "only allegation is that Ovid allegedly told her she could not 'get away' from him," and that that "simple statement ... does not equate ... to the use of force or a threat of force." Ovid argues that Manikhi made no "allegation that [she] attempted to object, to resist or to exit the stationary bus but was prevented by Ovid in some manner from doing so." In other words the asserted defect in Manikhi's complaint is that she was not restrained--she was free to go.

[HN31] As a substantive matter, "the necessary elements of a case for false imprisonment are a deprivation of the liberty of another without his consent and without legal justification." *The Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 654, 261 A.2d 731, 738 (1970)[***45] (citing *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 122 A.2d 457 (1956)). These three elements are alleged here.

First, Manikhi denies consent. Second, since Ovid was also an A-Cleaner, one reasonably may infer that he did not possess legal authority for his actions. Compare *K-Mart Corp. v. Salmon*, 76 Md. App. 568, 583-84, 547 A.2d 1069, 1076 (1988) (noting that [HN32] "legal justification is the equivalent of legal authority," and providing the example of an arrest pursuant to a valid warrant as an example of such authority), cert. denied, 314 Md. 496, 551 A.2d 867 (1989), overruled on other grounds by *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995). Finally, Ovid's alleged actions--locking one of the bus doors, cutting off Manikhi's only other egress from that confined area by placing himself between her and the front door, turning out the lights of that confined area on a night shift, stating that she could not get away, and barraging her with lascivious puerilities--when taken together, constitute an implicit threat of force. Despite Ovid's assertion that Manikhi "provided no allegations ... that she attempted[***46] to leave [**113] the bus," a legally sufficient claim of false imprisonment [*366] does not require that Manikhi have attempted to get past Ovid under these circumstances in order to discover whether his implicit threat of force would be exercised. Instead, one may reasonably infer from Ovid's implicit threat that Manikhi's liberty was restrained. See *Mason v. Wrightson*, 205 Md. at 487, 109 A.2d at 131 (noting that [HN33] "any exercise of force, or threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain ... is an imprisonment" (quoting *Mahan v. Adam*, 144 Md. 355, 365, 124 A. 901, 904 (1924))).

For the foregoing reasons we shall reverse the dismissal of the false imprisonment count (Count II). n8

-----Footnotes-----

n8 We granted Ovid's cross petition for certiorari which raised the following question:

"Does the unappealed jury verdict against Petitioner and in favor of Respondent Ovid in regard to all battery incidents preclude Petitioner from using the same battery incidents as the basis for her petition requesting this Court to overturn the dismissal of her claims under 42 U.S.C. § 1983 and Article 24 of the Maryland Declaration of Rights, as well as her claims for intentional infliction of emotional distress, aiding and abetting and conspiracy?"

In that cross petition for certiorari Ovid argued that the judgment in his favor on the battery count also constituted issue preclusion as to false imprisonment.

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

The judgments appealed from were entered on the grant of a motion to dismiss for failure to state a claim. The record extract does not contain the testimony on which Manikhi relied to get to the jury, the trial court's instructions, or any special verdict at the trial on the battery count. In order to determine whether issue preclusion applies here, it would be necessary to identify the facts that necessarily had been decided by the jury verdict and to compare them with the allegations of the amended complaint. See *Butler v. State*, 335 Md. 238, 272, 643 A.2d 389, 405 (1994) (stating that "to apply collateral estoppel, we must analyze what the jury actually found based on the jury instructions that were actually given"); *Apostolides v. State*, 323 Md. 456, 464, 593 A.2d 1117, 1121 (1991) ("A collateral estoppel analysis focuses on what the fact finder did find or must have found."); *Johnson v. State*, 303 Md. 487, 522, 495 A.2d 1, 18 (1985) ("Before claiming the benefit of the doctrine, the party employing collateral estoppel must demonstrate that the issue of ultimate fact which has been decided in the previous case is the same as the issue in the instant proceeding."), cert. denied, 474 U.S. 1093, 106 S. Ct. 868, 88 L. Ed. 2d 907 (1986); *Buford v. Bunn*, 247 Md. 203, 208, 230 A.2d 636, 637-38 (1967) (stating that "where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action" (emphasis omitted; quoting *Lebrun v. Marcey*, 199 Md. 223, 227, 86 A.2d 512, 514 (1952))). Consequently, and without prejudice to Ovid's asserting the issue preclusion defense on remand, we do not rule on that defense.

-----End Footnotes-----
[***47]

[*367]

VII

In an unnumbered count Manikhi sues all of the respondents, alleging intentional infliction of emotional distress (IIED).

[HN34] A claim of IIED has four elements: "(1) The conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) the emotional distress must be severe." *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977). The Court of Special Appeals has stated that "each of these elements must be pled and proved with specificity." *Foor v. Juvenile Servs. Admin.*, 78 Md. App. 151, 175, 552 A.2d 947, 959, cert. denied, 316 Md. 364, 558 A.2d 1206 (1989); see *Silkworth v. Ryder Truck Rental, Inc.*, 70 Md. App. 264, 271, 520 A.2d 1124, 1128 (same), cert. denied, 310 Md. 2, 526 A.2d 954 (1987). n9

-----Footnotes-----

n9 In *Foor*, the Court of Special Appeals cited *Gallagher v. Bituminous Fire & Marine Insurance Co.*, 303 Md. 201, 492 A.2d 1280 (1985), for the particularity in pleading requirement. In *Gallagher*, this Court imposed that requirement with respect to a "cause of action in this tort arising out of the nonpayment of [workers'] compensation benefits." *Id.* at 212, 492 A.2d at 1285.

-----End Footnotes-----
[***48]

Manikhi's IIED count alleges:

"93. [The respondents] engaged in a continuing pattern of intentional and reckless conduct, that was extreme and [*114] outrageous, causing Ms. Manikhi severe emotional distress.

"94. The acts of [the respondents], including knowing refusal to protect Ms. Manikhi from Defendant Ovid's physical and verbal attacks, rise to the level of 'extreme and outrageous' conduct that is 'beyond all possible bounds of decency ... atrocious and unitarily [sic] intolerable in a civilized society.'["

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

[*368] "95. MTA knew of these acts, which rose to the level of physical conduct and caused Ms. Manikhi to seek medical treatment."

The Court of Special Appeals affirmed dismissal of this count, reasoning that Manikhi's allegation that she was forced to seek medical treatment fell "short of the requirement that [the element of severe] emotional distress be plead with particularity." Manikhi, 127 Md. App. at 534, 733 A.2d at 393.

The only specific allegation of emotional distress in the IIED count is that the respondents caused Manikhi "to seek medical treatment." Other parts of her complaint, however, are incorporated by reference into this count. Manikhi [***49]elsewhere alleges that she suffered fear at work, that the misconduct required her constantly to be alert, and that it forced her to leave Kirk Avenue for another work site, although she later returned to Kirk Avenue. Moreover, [HN35] "'in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the [severe emotional] distress has existed.'" Harris, 281 Md. at 571, 380 A.2d at 616 (quoting Restatement (Second) of Torts § 46 cmt. j (1965)).

The conclusory allegations within the IIED count fail to state a claim, and there are no facts alleged anywhere in the amended complaint describing conduct of the MTA, its Officials, or the Union Officials that is "extreme and outrageous." We shall assume, however, that Ovid's conduct was extreme and outrageous. Nonetheless, we agree with the Court of Special Appeals that, even taking these factors into account, the amended complaint fails to plead facts that, if true, would rise to the level of severe emotional distress.

[HN36] Previous cases indicate the high burden imposed by the requirement that a plaintiff's emotional distress be severe. n10 [*369] See *Caldor, Inc. v. Bowden*, 330 Md. 632, 642-45, 625 A.2d 959, 963-65 (1993)[***50] (affirming grant of judgment n.o.v. on IIED count because, although sixteen year old store employee was falsely imprisoned for four hours, coerced into signing confession that he had stolen money, and maliciously prosecuted, the evidence that he went to a psychologist one time, felt insecure and incapable of trusting others, and suffered weight loss did not suffice to show severe distress); Harris, 281 Md. at 572, 380 A.2d at 617 (affirming grant of judgment n.o.v. because, although other employees and a supervisor mimicked, harassed, and shamed plaintiff regarding stuttering defect, evidence that he felt humiliated and that his speech impediment was exacerbated did not suffice to show severe distress); *Vauls v. Lambros*, 78 Md. App. 450, 460-61, 553 A.2d 1285, 1290-91 (1989) (affirming grant of judgment n.o.v. on ground that Jehovah's witness, when "disfellowshipped" and harassed by defendant, failed to show that her grief, stigmatization, and destruction of her own property constituted severe emotional distress); *Hanna v. Emergency Med. Assocs.*, 77 Md. App. 595, 609, 551 A.2d 492, 499 (stating in dicta that trial court was correct[***51] to grant judgment on IIED count because severe depression, humiliation, and anxiety over career prospects and finances suffered by physician [**115] allegedly fired for filing civil rights claim against employer would not rise to level of severe emotional distress), cert. denied, 315 Md. 691, 556 A.2d 673 (1989); *Leese v. Baltimore County*, 64 Md. App. 442, 472, 497 A.2d 159, 174 (affirming dismissal for failure to state a claim when terminated employee's complaint alleged that he suffered "physical pain, emotional suffering and great mental anguish" because these allegations fell "short of the 'evidentiary particulars' that must be pleaded to show a prima facie case of severe injury" (quoting Harris, 281 Md. at 572, 380 A.2d at 617)), cert. denied, 305 Md. 106, 501 A.2d 845 (1985), overruled on other grounds by *Harford County v. Town of Belair*, 348 Md. 363, 704 A.2d 421 (1998); *Moniodis v. Cook*, 64 Md. App. 1, 15-16, 494 A.2d 212, 219 (holding that trial court erred in submitting to jury IIED claims for certain terminated employees forced to take polygraph exams because evidence of [*370]increased[***52] smoking, lost sleep, and hives did not indicate that any of these plaintiffs was "emotionally unable, even temporarily, to carry on to some degree with the daily routine of her life"), cert. denied, 304 Md. 631, 500 A.2d 649 (1985).

-----Footnotes-----

n10 Many previous cases have found that a cause of action in IIED did not lie because the plaintiff could not satisfy the "extreme and outrageous" element. See, e.g., *Batson v. Shiflett*, 325 Md. 684, 736-37, 602 A.2d 1191, 1216-17 (1992). We cite here only cases dealing with the requirement of severe emotional distress.

-----End Footnotes-----

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

Manikhi's amended complaint fails to allege a "severely disabling emotional response," Harris, 281 Md. at 570, 380 A.2d at 616, of the sort that rises above the allegations of emotional injury rejected in the cases cited. Nowhere does the complaint state with reasonable certainty the nature, intensity or duration of the alleged emotional injury. See Moniodis, 64 Md. App. at 15, 494 A.2d at 219[***53] (noting that [HN37] "severity [of emotional distress] is measured by factors including the intensity of the response as well as its duration" (citing Harris, 281 Md. at 571, 380 A.2d at 616)). For example, Manikhi does not state whether the medical treatment that she was forced to seek was of a psychological or physical nature, how long the treatment lasted, whether it was successful or is still continuing, whether it was periodic or intensive, and so forth.

Without such "evidentiary particulars," Harris, 281 Md. at 572, 380 A.2d at 617, the allegation that Manikhi was forced to seek medical treatment is akin to the plaintiff's assertion in Bowden, supra, that he went to a psychologist one time. In that case, this Court affirmed the trial court's grant of a judgment notwithstanding the verdict. On the same basis, and after taking into account all other incorporated allegations and inferences to be drawn therefrom, we affirm the dismissal of Manikhi's IIED count.

VIII

Manikhi contends that the Court of Special Appeals violated Rule 8-206(f) because Judge Eyler, the member of the appellate panel who authored that court's opinion, had been the[***54] judge assigned to a prehearing conference in the case. [HN38] Rule 8-206(f) provides that "[a] judge who conducts a prehearing conference shall not sit as a member of the panel assigned to hear the appeal in that case." (Emphasis added). [*371] Respondents point out, and Manikhi does not dispute the fact that, after Manikhi's counsel requested a postponement of the conference, Judge Eyler instead canceled it. Because Judge Eyler did not "conduct[]" the conference, the plain language of the rule does not require that he have recused himself.

Nonetheless, Manikhi submits that Judge Eyler "had received Civil Appeal Prehearing Information Reports from all parties" and that these "reports are not part of the record." It is true that [HN39] Rule 8-206(b) prohibits parties from referring to information disclosed at a prehearing conference. See Maryland Cas. Co. v. Lorkovic, 100 Md. App. 333, 362-63, 641 A.2d 924, 938 (1994) (noting that appellant included prehearing information report in record extract, that doing so violated Rule 8-206, and that the violation was "serious" because such a report could include confidential information about appellee); Seidel v. Panella, 81 Md. App. 124, 130-31, 567 A.2d 134, 137-38 (1989)[***55] (same with respect [*116] to appellee's conduct), cert. denied, 319 Md. 72, 570 A.2d 864 (1990).

We shall assume that Judge Eyler did in fact receive the report. From that factual predicate Manikhi attempts to demonstrate that she was harmed. The background to this phase of her argument is that the defendants had removed this case to the United States District Court for the District of Maryland, but it was remanded. In footnote 1 of the opinion of the Court of Special Appeals, that court attributes a description of the drafting of the original complaint as "painful and outrageous" to the federal district court judge who remanded this case to state court. In fact, those words were uttered by MTA's counsel during the hearing before Judge Dancy, after remand. Manikhi appears to be contending that the misattribution is a sign that she was prejudiced by Judge Eyler's authorship of the Court of Special Appeals' opinion. This contention is entirely without merit. Footnote 1 does contain a misattribution, n11 but the error is minor and totally [*372] irrelevant. It has nothing to do with any possible confidential information that might have been contained in prehearing reports.

-----Footnotes-----

n11 The Court of Special Appeals' footnote states, "According to the transcript of the ... hearing in circuit court, the U.S. District Judge, in ordering the remand, characterized the drafting of the complaint as 'painful and outrageous.'" Manikhi, 127 Md. App. at 505 n.1, 733 A.2d at 377 n.1 (emphasis added). The precise fact of the matter is that the federal district judge described the incoherence of Manikhi's complaint as "painful," initially agreed with MTA's counsel's description of it as "outrageous," but then stated, "I think it's--well, perhaps outrageous is too strong a word." After remand, at the hearing before Judge Dancy, the same counsel for MTA stated that the federal judge had described

360 Md. 333, *, 758 A.2d 95, **;
2000 Md. LEXIS 517, ***

the complaint as "painful and outrageous." Thus, the transcript referred to in the court's footnote does indeed attribute these words to the federal district court judge.

-----End Footnotes-----

***56]

In sum, because no prehearing conference was conducted, the plain language of Rule 8-206(f) did not require the judge who initially scheduled that conference to recuse himself from the panel that heard Manikhi's appeal, and Manikhi suffered no prejudice from the presence of that judge on the panel.

JUDGMENT OF THE COURT OF SPECIAL APPEALS ON COUNT II (FALSE IMPRISONMENT) REVERSED AS TO RESPONDENT, FRANCISCO OVID, ON COUNT V (TITLE VII) REVERSED AS TO THE RESPONDENT, MASS TRANSIT ADMINISTRATION, AND ON COUNTS VII (§ 1983) AND XII (MARYLAND CONSTITUTION) REVERSED AS TO THE RESPONDENTS, WADE MORAGNE-EL AND VERNON PARSONS. CASE REMANDED TO THE COURT OF SPECIAL APPEALS AS TO THOSE COUNTS AND RESPONDENTS WITH INSTRUCTIONS TO REMAND THIS ACTION AS TO THOSE COUNTS AND RESPONDENTS TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. AS TO ALL OTHER COUNTS, UNNUMBERED CLAIMS, AND PARTIES, THE JUDGMENT OF THE COURT OF SPECIAL APPEALS IS AFFIRMED.

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS BETWEEN THE PETITIONER, JACQUELINE MANIKHI, AND THE RESPONDENTS, MASS [*373] TRANSIT ADMINISTRATION, FRANCISCO OVID, WADE MORAGNE-EL, AND VERNON PARSONS, [***57] TO BE PAID ONE-THIRD BY THE PETITIONER AND TWO-THIRDS BY THOSE RESPONDENTS.

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS BETWEEN THE PETITIONER AND THE RESPONDENTS, CHARLES PETTUS, ENNIS FONDER, AND NELSON ZOLLICOFFER, TO BE PAID BY THE PETITIONER, JACQUELINE MANIKHI.

METROMEDIA, INC., etc. v. DAVID H. HILLMAN et al.
Misc. No. 5, September Term, 1978

Court of Appeals of Maryland

285 Md. 161; 400 A.2d 1117; 1979 Md. LEXIS 209; 5 Media L.Rep. 1620

May 8, 1979, Decided

PRIOR HISTORY: [***1]

Certification of Questions of Law from the United States District Court for the District of Maryland; C. Stanley Blair, J.

DISPOSITION: Questions of law answered as herein set forth; appellees to pay the costs.

CASE SUMMARY:

PROCEDURAL POSTURE: The matter came before the court by certification from the United States District Court for the District of Maryland.

OVERVIEW: Broadcaster was sued in federal court for libel by citizen as a result of a television broadcast. The questions certified to the court were (1) did Maryland law continue to recognize any distinction between libel per se and libel per quod and (2) if so, did Maryland law continue to require the pleading and proof of special damages in cases where extrinsic facts were necessary to show the libelous nature of the statement made by the defendant in cases of libel per quod? The court found that in order for a declaration alleging libel in a Maryland court to have withstood the test of a demurrer, it must have alleged (1) a false and defamatory communication which the maker knew was false and or that the maker acted recklessly or negligently; and (2) that the statement was one which appeared on its face to be defamatory; and (3) damages with some particularity. The court concluded that the only distinction between a libel per se and a libel per quod was that to recover, a plaintiff must first show that the publication was defamatory, and where the words themselves imputed the defamatory character, no allegation or proof of extrinsic facts was necessary.

OUTCOME: The certified questions were answered that in Maryland, one no longer could recover on a declaration which merely alleged that a person publicly called an individual a thief, whether orally or in writing.

CORE TERMS: libel, defamatory, slander, actionable, declaration, libel per quod, presumed, defamation, actual injury, public figure, legal right, media, thief, quod, falsity, certifying, injurious, extrinsic facts, public official, non-media, libel and slander, special damage, falsehoods, innuendo, invasion, fault, reckless disregard, special damages, negligently, impute

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Appeals: Appellate Jurisdiction: Certified Questions

[HN1] Under Md. Code Ann., Cts. & Jud. Proc. § 12-601 (1974), jurisdiction is granted to the court to answer questions of law certified to it by a United States District Court if there is involved in any proceeding before the certifying court a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the Court of Appeals of this state.

Torts: Defamation & Invasion of Privacy: Libel

[HN2] Under Maryland principles of pleading the same rules continue to apply as to the nature of the libel. That is, if the libel is readily apparent as in the situation where one is called a thief, no explanation is necessary, but in the instances which previously would have been a libel per quod, the nature of the libel must be pleaded with the same particularity as formerly. Since nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod.

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

Torts: Defamation & Invasion of Privacy: Libel

[HN3] The difference between libel per se and libel per quod is based on a rule of evidence and the difference between them lies in the proof of the resulting injury. In the case of words or conduct actionable per se, their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable only per quod, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage.

Torts: Defamation & Invasion of Privacy: Slander

[HN4] The historical distinction between slander per se and slander per quod is undoubtedly based on the theory that in words actionable per se, their injurious character is a fact of common notoriety, and necessarily import damages not requiring proof of special damages; while, if the words used are not defamatory per se, they must be explained by innuendo and colloquium. Words, which falsely charge a person with or impute to him the commission of a crime for which he is liable to be prosecuted and punished are actionable per se. To impute any crime or misdemeanor, for which corporal punishment is to be inflicted, is actionable without proof of special damage. If spoken words convey an implication of crime, they are actionable in whatever mode their meaning may be expressed, that is, whether by way of interrogation, insinuation, ironic praise or any other form of speech understood by the hearers.

Torts: Defamation & Invasion of Privacy: Libel

Torts: Defamation & Invasion of Privacy: Absolute Privileges

[HN5] In a state libel trial, a public official must establish "malice," defined as a knowing falsity or a reckless disregard for the truth, on the part of the publisher to recover damages for defamatory statements concerning the plaintiff's official conduct. The traditional defense of truth, the Court held, did not provide adequate protection to the First Amendment rights of the press.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN6] The definition of a public figure includes not only public officials but also those individuals who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN7] If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN8] The constitutional privilege does not extend to defamatory falsehoods concerning an individual who is neither a public official nor a public figure. In cases of defamation of private persons (1) the state may not impose liability without fault, but with that limitation may adopt any other standard of media liability, and (2) in cases where the test of knowing or reckless falsity is not met, the state may permit recovery for "actual injury" but not presumed or punitive damages. Such "actual injury" is not confined to out-of-pocket loss, but may include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN10] Under the negligence standard truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity. Proof of fault in cases of purely private defamation must meet the standard of the

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

preponderance of the evidence. This is the quantum of proof ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] The difference between libel per se and libel per quod is based on a rule of evidence and the difference between them is in the proof of the resulting injury. However, proof must come in accordance with the allegations, which have been made in the declaration. In the case of words or conduct actionable only per quod, the injurious effect must be established by allegations and proof of special damage.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

[HN12] It is one of the first principles of pleading, that facts should be stated, for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. This essential and fundamental principle, which is incorporated into the simplified system of pleading, has certainly been ignored in framing the counts in the present declaration. Md. Code Ann. art. 75, § 2.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

[HN13] A declaration in Maryland is required by Md. R. Civ. P., Dist. Ct. 340 to comply with Md. R. Civ. P., Dist. Ct. 301. The latter rule specifies that a pleading shall contain a clear statement of the facts necessary to constitute a cause of action.

Torts: Damages

[HN14] One may not recover in tort unless the defendant has violated a legal right of the plaintiff which has caused him injury.

Torts: Damages

[HN15] Legal damage resulting from some injury to the right of another or from the breach of a duty owing to such other has been regarded as a necessary element of a cause of action in his favor. It is basic tort law that wrong without damage does not constitute a good cause of action. However, a direct invasion of a legal right imports damage, and whenever there is a wrongful invasion of a clear legal right, the law infers or presumes damage sufficient to support an action. In such case, the injury is regarded as the gist of the action. The general rule is that a person injured by the commission of a tort is entitled to actual pecuniary compensation for the injury sustained, and except where the circumstances are such as to warrant the allowance of exemplary damages, he is limited to such compensation. Where a legal right is to be vindicated against an invasion that has produced no actual loss of any kind, the damages recoverable are nominal. There can be no recovery in tort where the damages are unascertainable. Thus, it is logically impossible to measure the difference between life with defects and the utter void of nonexistence, there can be no recovery for wrongful birth.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN16] In Maryland one no longer may recover on a declaration which merely alleges that a person publicly called an individual a thief, whether orally or in writing.

Torts: Defamation & Invasion of Privacy: Libel

[HN17] In order for a declaration alleging libel in a Maryland court to withstand the test of a demurrer it must allege: (1) a false and defamatory communication which the maker knows is false and knows that it defames the other, or that the maker has acted in reckless disregard of these matters, or that the maker has acted negligently in failing to ascertain them; and (2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory; and (3) allegations of damages with some particularity.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

[HN18] In Maryland a pleading to be sufficient must show a basis for believing that the plaintiff has sustained actual injury. A declaration must indicate more than extravagant and diffuse conclusions of the pleader.

Civil Procedure: Pleading & Practice: Pleadings: Interpretation

285 Md. 161, *, 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

Torts: Damages: Damages Generally

[HN19] The only distinction remaining in Maryland between a libel per se and a libel per quod is that to recover the plaintiff must first show that the publication is defamatory. Where the words themselves impute the defamatory character, no innuendo -- no allegation or proof of extrinsic facts -- is necessary; but otherwise, it is. This is both a pleading rule and an evidentiary requirement. Where extrinsic facts must be shown in order to establish the defamatory character of the words sued upon, the omission to plead them makes the complaint demurrable for failure to state a cause of action. Failure to prove them would justify a directed verdict.

COUNSEL: H. Thomas Howell, with whom were John H. Mudd and Semmes, Bowen & Semmes on the brief, for appellant.

Steven A. Michael, with whom were Sando & Michael on the brief, for appellees.

JUDGES: Murphy, C. J., and Smith, Digges, Eldridge, Cole and Davidson, JJ., and Alan M. Wilner, Associate Judge of the Court of Special Appeals, specially assigned. Smith, J., delivered the opinion of the Court.

OPINIONBY: SMITH

OPINION: [*162] [**1118] This case comes to us by certification from the United States District Court for the District of Maryland. [HN1] Under Maryland Code (1974) § 12-601, Courts and Judicial Proceedings Article, jurisdiction is granted to this Court to "answer questions of law certified to it by . . . a United States District Court . . . if there is involved in any proceeding[***3] before the certifying court a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the Court of Appeals of this state." Pursuant to that authority two questions have been certified to us:

(1) In light of *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976), and *General Motors Corporation v. Piskor*, 277 Md. 165, 352 A. 2d 810 (1976), does Maryland law continue to recognize any distinction between libel per se and libel per quod?

(2) If such a distinction is recognized, does Maryland law continue to require the pleading and proof of special damages in cases where extrinsic facts are necessary to show the libelous nature of the statement made by the defendant, that is, in cases of libel per quod?

We observe that by reason of *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976), much of the distinction or [*163] difference between libel per se and libel per quod has in fact disappeared. [HN2] Under Maryland principles of pleading the same rules [**1119] continue to apply as to the nature[***4] of the libel. That is, if the libel is readily apparent as in the situation where one is called a thief, no explanation is necessary, but in the instances which previously would have been a libel per quod, the nature of the libel must be pleaded with the same particularity as formerly. Since nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod.

To answer the certified questions it is not necessary in this instance to allude to the facts before the certifying court. It will be sufficient to say that *Metromedia, Inc., etc.*, has been sued for libel by David H. Hillman et al. as a result of a television broadcast.

As we see it, for the purpose of answering the certified questions we have no need to involve ourselves in the controversy that has raged between certain scholars relative to libel per se and libel per quod. See, e.g., Eldredge, *Variation on Libel Per Quod*, 25 Vand. L. Rev. 79 (1972); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733 (1966); Murnaghan, *Ave Defamation, Atque Vale Libel and Slander*, 6 U. of [***5] Balt. L. Rev. 27 (1976); Murnaghan, *From Fignment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions*, 22 Cath. U. L. Rev. 1 (1972); Prosser, *More Libel Per Quod*, 79 Harv. L. Rev. 1629 (1966); and Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839 (1960).

In *M & S Furniture v. De Bartolo Corp.*, 249 Md. 540, 241 A. 2d 126 (1968), Judge Horney explained for the Court [HN3] the difference between libel per se and libel per quod:

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

The distinction is based on a rule of evidence and the difference between them lies in the proof of the resulting injury. In the case of words or conduct actionable per se, their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable [*164] only per quod, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage. The cases in this state are collected in 14 M.L.E., Libel and Slander, [***6] § 11 [(1961)]. See also 33 Am. Jur., Libel and Slander, § 5 [(1941)]; 53 C.J.S., Libel and Slander, § 170 b, c [(1948)]. [Id. at 544.]

The origin of the distinction was explained by Judge Horney for the Court in *American Stores Co. v. Byrd*, 229 Md. 5, 181 A. 2d 333 (1962), although in that instance the reference was to slander and not libel:

[HN4] The historical distinction between slander per se and slander per quod is undoubtedly based on the theory that in words actionable per se, their injurious character is a fact of common notoriety, and necessarily import damages not requiring proof of special damages (cf. *Foley v. Hoffman*, 188 Md. 273 [52 A. 2d 476 (1947)]); while, if the words used are not defamatory per se, they must be explained by innuendo and colloquium (cf. *Walker v. D'Alesandro*, 212 Md. 163 [129 A. 2d 148 (1957)]). See *Odgers on Libel and Slander* (Am. Ed. by Bigelow), p. * * * 309.

Consistently this Court has held that words which falsely charge a person with or impute to him the commission of a crime for which he is liable to be prosecuted and punished are actionable per se. See, for example, the early [***7] case of *Dorsey v. Whipps*, 8 Gill 457, 462 (1849), where, in quoting 1 Starkie on Slander, p. 43, it was said: "To impute any crime or misdemeanor, for which corporal punishment is to be inflicted, is actionable without proof of special damage." And see *Haines v. Campbell*, 74 Md. 158, 21 Atl. 702 (1891), where it was stated that if spoken words convey an implication of crime, they are actionable in whatever mode their meaning may be [*165] expressed, that is, whether by way of interrogation, insinuation, ironic praise or any other form of speech understood by the hearers. See also *Wheatley v. Wallis*, 3 H. & J. 1 (1810); *Bonner v. Boyd*, 3 H. & J. 278 [**1120] (1811); *Long v. Eakle*, 4 Md. 454 (1853); *Shockey v. McCauley*, 101 Md. 461, 61 Atl. 583 (1905). Other cases in this area are collected in 14 M.L.E., Libel and Slander, § 14 (Commission of Crime). [Id. at 12 and 13.]

For discussion of special damages see *Shafer v. Ahalt*, 48 Md. 171, 174 (1878); *Cheek v. J. B. G. Properties, Inc.*, 28 Md. App. 29, 32-33, 344 A. 2d 180 (1975); 1 J. Poe, *Pleading and Practice* § 174 (5th ed. Tiffany 1925); and 1 J. Chitty, *Treatise* [***8] on Pleading * 411 (16th Am. ed. Perkins 1876).

In *Jacron*, supra, Judge Levine reviewed for the Court the changes brought in the law of libel and slander by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967); *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974). n1 He said of those opinions:

At common law, the only defenses available to a publisher of defamatory material were truth and the common law privileges. Then, in its landmark decision in *New York Times*, the Supreme Court held that [HN5] in a state libel trial, a public official must establish "malice," defined as a knowing falsity or a reckless disregard for the truth, on the part of the publisher to recover damages for defamatory statements concerning the plaintiff's official conduct. The traditional defense of truth, the Court held, did not provide adequate protection to the First Amendment rights of the press.

[*166] Three years later, in *Curtis Publishing Co. v. [***9] Butts*, supra, another unanimous Court expanded the class of plaintiffs subject to the *New York Times* test to include "public figures." Although Mr. Justice Harlan wrote the opinion for the Court, a majority agreed with Mr. Chief Justice Warren's [HN6] definition of a public figure, which included not only public officials but also those individuals who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164. The Chief Justice assumed that involvement in public issues or events itself guaranteed access to the means by which defamatory criticism might be controverted.

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

In *Rosenbloom v. Metromedia*, supra, in an opinion joined by only two other members of the Court, Mr. Justice Brennan appeared to extend the constitutional privilege enunciated in *New York Times* yet another step further by applying it to defamatory falsehoods if the statements concern matters of public or general interest, regardless of the status of the person defamed. The essence of the opinion is this:

[HN7] "If a matter is a subject of public or general interest, it cannot suddenly[***10] become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety . . ." 403 U.S. at 43. [Id. 276 Md. 584-86 (footnotes omitted).]

Judge Levine went on to say for this Court:

Thus was the stage set for *Gertz*. There, the plaintiff was a Chicago attorney prosecuting a civil [*167] action for the family of a youth who had been shot and killed by a police officer. The officer had previously been convicted of second degree murder in the incident, but the plaintiff had neither participated in the criminal proceeding nor discussed the officer with media representatives. Nevertheless, [**1121] the defendant published an article characterizing the plaintiff as the "architect of the criminal prosecution" which it portrayed as part of a nationwide Communist conspiracy to discredit local law enforcement agencies. The article falsely accused the plaintiff of membership[***11] in Communist-front organizations and of having a criminal record. After a jury had awarded the plaintiff \$50,000 in damages, the trial court, anticipating *Rosenbloom* and granting the defendant's motion for a judgment n.o.v., ruled that the *New York Times* standard should govern even though the plaintiff was neither a public official nor a public figure. On appeal, the United States Court of Appeals upheld the trial court on the ground that, regardless of whether the plaintiff was a public figure, the defamatory statements concerned an issue of significant public interest. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

The Supreme Court, with a majority of five, held that [HN8] the constitutional privilege articulated in *New York Times* does not extend to defamatory falsehoods concerning an individual who is neither a public official nor a public figure. Rather than expand the *New York Times* standard to falsehoods relating to private persons when made in connection with events of public interest, as the *Rosenbloom* plurality had done, the Court applied a number of restrictions to the law of libel designed to accommodate freedom of the press with the[***12] state's interest in protecting a private person's reputation. The Court held that in cases of defamation of private persons (1) the state may not impose liability without [*168] fault, but with that limitation may adopt any other standard of media liability, and (2) in cases where the *New York Times* test of knowing or reckless falsity is not met, the state may permit recovery for "actual injury" but not presumed or punitive damages. Such "actual injury" was not confined to out-of-pocket loss, but may include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 418 U.S. at 350. [Id. at 586-87.]

-----Footnotes-----

n1 For yet another development in the law of libel and slander, see the very recent case of *Herbert v. Lando*, U.S. , 99 S. Ct. 1635, 60 L.Ed.2d 1115 (1979). It has no bearing on this case, however.

-----End Footnotes-----

Since under *Gertz* we were no longer permitted to impose liability on the media without fault, as, e.g., by permitting recovery[***13] of nominal damages for calling a person a thief, and since where the *New York Times* test of reckless falsity was not met, presumed or punitive damages were no longer permitted, it became necessary to frame new rules. We concluded that "applying the *Gertz* holding to non-media defendants and to slander as well as libel [would promote] consistency and simplicity in the law of defamation." Id. at 593. Accordingly, we held "that the rules announced in *Gertz* apply to cases of libel and slander alike brought against non-media defendants" and, thus, that "the principles of *Gertz* [were] applicable [in *Jacron*]." Id. at 594. It then became necessary that we adopt a standard by which potential liability

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

might be measured. We held that henceforth in Maryland such cases would be judged by the standard of negligence now embodied in Restatement (Second) of Torts § 580B (1977):

[HN9] One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he[***14]

(a) knows that the statement is false and that it defames the other,

(b) acts in reckless disregard of these matters, or

[*169] (c) acts negligently in failing to ascertain them.

See 276 Md. at 596-97. Thus, we said "that [HN10] under the negligence standard . . . truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity." Id. at 597. We held "that proof of fault in cases of purely [*1122] private defamation must meet the standard of the preponderance of the evidence. This is the quantum of proof ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries." Id. at 597.

General Motors Corp. v. Piskor, 277 Md. 165, 352 A. 2d 810 (1976), and IBEW, Local 1805 v. Mayo, 281 Md. 475, 379 A. 2d 1223 (1977), applied the principles of Jacron, but in no way altered them.

Jacron was a non-media case while this is a media case. However, since we adopted a single standard for media and non-media cases in [***15] Jacron, it is obvious that it is no longer possible in Maryland to recover damages by simply alleging a libel per se. It is true that in M & S Furniture, supra, 249 Md. at 544, Judge Horney referred for the Court to [HN11] the difference between libel per se and libel per quod as being "based on a rule of evidence" and referred to "the difference between them [as being] in the proof of the resulting injury." However, proof must come in accordance with the allegations which have been made in the declaration. In fact, the Court there said, "In the case of words or conduct actionable only per quod, the injurious effect must be established by allegations and proof of special damage" (Emphasis added.) Therefore, it seems to us that to provide any kind of a definitive answer to the question here posed one must give consideration to the purpose of pleadings.

In Pearce v. Watkins, 68 Md. 534, 539, 13 A. 376 (1888), the Court struck down a declaration, saying, "It gives no notice what the defendants were expected to defend, and might expect to be proved against them." In Gent v. Cole, 38 Md. 110 [*170] (1873), Judge Alvey quoted for the Court from Rex v. [***16] Lyme Regis, 1 Doug. 149 (1779), saying:

[HN12]

[I]t is one of the first principles of pleading, that facts should be stated, "for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." This essential and fundamental principle, which is incorporated into our simplified system of pleading, (Code, Art. 75, sec. 2,) has certainly been ignored in framing the counts in the present declaration. [Id. at 113 (emphasis in original).]

[HN13] A declaration in Maryland is required by Maryland Rule 340 to comply with Rule 301. The latter rule specifies that a pleading shall contain "a clear statement of the facts necessary to constitute a cause of action" In Richardson v. Boato, 207 Md. 301, 114 A. 2d 49 (1955), Judge Hammond observed for the Court:

[HN14] One may not recover in tort unless the defendant has violated a legal right of the plaintiff which has caused him injury. In the invasions of person or property for which trespass was the remedy, injury was presumed from the violation of the absolute[***17] legal right. In the deceit and negligence cases, actual injury had to be shown to make an actionable wrong. [Id. at 304.]

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

After further discussion of these principles and their application, the Court said, "In the case before us, the negligence of the appellee gave no right of action to the appellant unless that negligence injured or harmed her." Id. at 306. This theory is explained in 74 Am. Jur. 2d Torts § 7 (1974):

[HN15] Legal damage resulting from some injury to the right of another or from the breach of a duty owing to such other has been regarded as a necessary element of a cause of action in his favor. It is basic [*171] tort law that wrong without damage does not constitute a good cause of action. However, a direct invasion of a legal right imports damage, and whenever there is a wrongful invasion of a clear legal right, the law infers or presumes damage sufficient to support an action. In such case, the injury is regarded as the gist of the action.

The general rule is that a person injured by the commission of a tort is entitled to actual pecuniary compensation for the injury sustained, and except where [**1123] the circumstances are such[***18] as to warrant the allowance of exemplary damages, he is limited to such compensation. Where a legal right is to be vindicated against an invasion that has produced no actual loss of any kind, the damages recoverable are nominal. But it has been said that there can be no recovery in tort where the damages are unascertainable. Thus, it has been held that since it is logically impossible to measure the difference between life with defects and the utter void of nonexistence, there can be no recovery for wrongful birth. [Id. at 625-26 (footnotes omitted).]

Accord 86 C.J.S. Torts §§ 21 and 22 (1954).

It is certain that under Jacron [HN16] in Maryland one no longer may recover on a declaration which merely alleges that a person publicly called an individual a thief, whether orally or in writing. Nor could one recover by simply alleging that one negligently (in the terms of the Restatement) called an individual a thief. More is necessary. We see the question here as being not so much a distinction between libel per se and libel per quod as a question of what is necessary to put a defendant on notice, what will satisfy our pleading requirements. We would not presume[***19] to tell the United States District Court how a pleading should be framed under the Federal Rules of Civil Procedure. Suffice it to say the effect in Maryland of Gertz and Jacron is that [HN17] in order for a [*172] declaration alleging libel in a Maryland court to withstand the test of a demurrer it must allege:

(1) a false and defamatory communication

a - which the maker knows is false and knows that it defames the other, or

b - that the maker has acted in reckless disregard of these matters, or

c - that the maker has acted negligently in failing to ascertain them, and

(2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory, and

(3) allegations of damages with some particularity, since Gertz and Jacron forbid presumed damages.

In other words, as to (3) [HN18] in Maryland a pleading to be sufficient must show a basis for believing that the plaintiff has sustained actual injury as defined in Jacron. As Judge Hammond noted in Richardson, supra, 207 Md. at 304, in some types of[***20] action injury was presumed from the violation of an absolute legal right while in others actual injury has to be shown to make a wrong actionable. In the words of the Court in Garonzik v. Balto. Fed. S. & L. Ass'n, 225 Md. 322, 323, 170 A. 2d 219 (1961), a declaration must indicate more "than extravagant and diffuse conclusions of the pleader."

[HN19] In sum, the only distinction remaining in Maryland between a libel per se and a libel per quod is that to recover the plaintiff must first show that the publication is defamatory. Where the words themselves impute the defamatory character, no innuendo -- no allegation or proof of extrinsic facts -- is necessary; but otherwise, it is. This is both a pleading rule and an evidentiary requirement. Where extrinsic facts must be shown in order to establish the defamatory character of the [*173] words sued upon, the omission to plead them makes the complaint demurrable for failure to state a cause of action. Failure to prove them would justify a directed verdict.

285 Md. 161, *; 400 A.2d 1117, **;
1979 Md. LEXIS 209, ***; 5 Media L. Rep. 1620

Questions of law answered as herein set forth; appellees to [***21] pay the costs.

MILKOVICH v. LORAIN JOURNAL CO. ET AL.
No. 89-645

SUPREME COURT OF THE UNITED STATES

497 U.S. 1; 110 S. Ct. 2695; 111 L. Ed. 2d 1; 1990 U.S.LEXIS 3296; 58 U.S.L.W. 4846; 17 Media L. Rep. 2009

April 24, 1990, Argued
June 21, 1990, Decided

PRIOR HISTORY:

CERTIORARI TO THE COURT OF APPEALS OF OHIO, LAKE COUNTY.

DISPOSITION: 46 Ohio App. 3d 20, 545 N. E. 2d 1320, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner coach challenged a decision of the Court of Appeals of Ohio, Lake County which affirmed an order granting summary judgment to respondents author and newspaper in a suit for damages for defamation.

OVERVIEW: Petitioner coach sued respondents author and newspaper for defamation after respondents printed an article implying that petitioner lied under oath. The trial court granted summary judgment for respondents and the appellate court affirmed holding that the article was an opinion protected by U.S. Const., amend. I. The United States Supreme Court reversed holding that U.S. Const., amend. I did not prohibit application of Ohio's libel laws to the alleged defamation. The Court said that there was no absolute privilege protecting opinion from application of defamation laws. It said that the dispositive question was whether a reasonable factfinder could conclude that respondents statements implied that petitioner perjured himself. The Court said that the connotation that petitioner perjured himself was sufficiently factual to be susceptible of being proved true or false. It said that petitioner had to show that the connotations were false and made with some level of fault.

OUTCOME: The Court reversed the finding that an article referring to petitioner was an opinion protected by the First Amendment where it held that there was no absolute privilege under the First Amendment protecting opinion from application of state defamation laws.

CORE TERMS: defamation, defamatory, column, First Amendment, lied, team, speaker, coach, libel, reputation, hyperbole, attended, actionable, liar, conjecture, perjury, falsity, lesson, actual malice, expression of opinion, fair comment, newspaper, wrestling, statements of fact, public official, quotation, media, constitutionally protected, defamation action, common law

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN1] The First Amendment to the United States Constitution, U.S. Const., amend. I, places limits on the application of the state law of defamation. A public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Evidence: Procedural Considerations: Inferences & Presumptions

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN2] The New York Times test, requiring a public official to show actual malice in order to recover in a defamation suit, applies to criticism of public figures as well as public officials. The constitutional privilege protects defamatory criticism of nonpublic persons who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. The citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of public officials. Both for public officials and public figures, a showing of New York Times malice is subject to a clear and convincing standard of proof.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN3] The New York Times malice standard, requiring a public official to show actual malice in order to recover in a defamation suit, is inappropriate for a private person attempting to prove he was defamed on matters of public interest. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. More important, public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. Nonetheless, certain significant constitutional protections are warranted in this area. States cannot impose liability without requiring some showing of fault. States cannot permit recovery of presumed or punitive damages on less than a showing of New York Times malice.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN4] The common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern. The plaintiff bears the burden of showing falsity, as well as fault, before recovering damages. Although requiring the plaintiff to show falsity insulates from liability some speech that is false, but unprovably so, placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result.

Civil Procedure: Appeals: Standards of Review: De Novo Review

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN5] In cases raising speech issues protected by U.S. Const., amend. I, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN6] A statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations where a media defendant is involved. A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN7] The issue of falsity in a defamation action relates to the defamatory facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

497 U.S. 1, *; 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

[HN8] Where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault. The foregoing determinations should be made in a manner so as not to constitute a forbidden intrusion of the field of free expression.

DECISION: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law.

SUMMARY: A high school wrestling coach and the superintendent of the public school district in which the coach was employed testified at a hearing held in an Ohio state court concerning an altercation which took place at a wrestling meet involving the coach's team. Thereafter, an article which appeared in a local newspaper expressed disapproval of the conduct of the coach and the superintendent at the hearing and included a statement that "[a]nyone who attended the [wrestling] meet ... knows in his heart that [the coach and the superintendent] lied at the hearing." The coach commenced a defamation action in the Court of Common Pleas of Lake County, Ohio against the author of the article and the owner of the newspaper in which it was published, alleging that various passages in the article, and the headline appearing above it, (1) accused him of committing the crime of perjury, (2) damaged him in his occupation as a coach and teacher, and (3) constituted libel per se. The court granted a directed verdict for the defense on the ground that the evidence failed to establish that the article was published with "actual malice." The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to permit the case to go to the jury. On remand, the trial court granted summary judgment for the defense on the grounds that (1) the article was an opinion protected from a libel action by "constitutional law," and alternatively, (2) as a public figure, the coach had failed to make a prima facie case of actual malice. The Ohio Court of Appeals affirmed both rulings, but the Supreme Court of Ohio reversed and remanded, holding that (1) the coach was neither a public figure nor a public official under the relevant law, and (2) the allegedly defamatory statements were factual assertions as a matter of law and were not constitutionally protected as the opinions of the author. Meanwhile, the public school superintendent had been pursuing a separate defamation action in the Ohio courts, based on the same newspaper article. Two years after its decision in the coach's suit, the Ohio Supreme Court, upholding a summary judgment against the superintendent in his suit, reversed its position on the article, stating that the article was "constitutionally protected opinion." Considering itself bound by the Ohio Supreme Court's decision in the superintendent's suit, the Ohio Court of Appeals subsequently affirmed a summary judgment for the defense in the coach's suit, concluding that it had been decided as a matter of law that the newspaper article was constitutionally protected opinion (46 Ohio App 3d 20, 545 NE2d 1320). The Ohio Supreme Court dismissed the coach's appeal (43 Ohio St 3d 707, 540 NE2d 724).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by Rehnquist, Ch. J., joined by White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ., it was held that the Federal Constitution's First Amendment did not prohibit the application of Ohio's libel laws to the allegedly defamatory statements contained in the newspaper article, because (1) no additional constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment, inasmuch as the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact; (2) a reasonable factfinder could conclude that the statements in the newspaper article imply an assertion that the coach perjured himself at the judicial hearing; (3) the connotation that the petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false; and (4) the refusal to declare a separate constitutional privilege for "opinion" strikes a proper balance between the First Amendment's vital guarantee of free and uninhibited discussion of public issues and the important social values which underlie the law of defamation.

Brennan, J., joined by Marshall, J., dissented, expressing the view that the allegedly defamatory statements could not reasonably be interpreted as either stating or implying defamatory facts about the coach.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

defamation -- statements protected by First Amendment -- public figures -- matters of public concern -- proof of malice -
- presumed or punitive damages -- review of whole record --

Headnote:

In a state-law action for defamation brought against the author of a newspaper article and the owner of the newspaper in which the article was published, where a reasonable factfinder could conclude that statements in the article imply an assertion that a high school athletic coach perjured himself at a judicial hearing, and where the connotation that the coach committed perjury is sufficiently factual to be susceptible of being proved true or false, the Federal Constitution's First Amendment does not prohibit the application of state libel laws to such statements, notwithstanding the contention that the statements are expressions of opinion, because (1) no additional constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment, inasmuch as, under existing constitutional doctrine, (a) a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection, at least in situations, such as the present case, where a media defendant is involved, (b) statements that cannot reasonably be interpreted as stating actual facts about an individual are constitutionally protected, (c) where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with "actual malice," that is, with knowledge of their false implications or with reckless disregard of their truth, and where such a statement reasonably implying false and defamatory facts involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault, (d) the limitations on presumed or punitive damages established by *New York Times Co. v Sullivan* (1964) 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, and *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997, apply to the type of statements at issue in the present case, and (e) an appellate court in a case raising First Amendment issues is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression; (2) the breathing space which freedoms of expression require in order to survive is thus adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact; and (3) the refusal to declare a separate constitutional privilege for "opinion" strikes a proper balance between the First Amendment's vital guarantee of free and uninhibited discussion of public issues and the important social values which underlie the law of defamation. (Brennan and Marshall, JJ., dissented from this holding.)

[***HN2]

preclusion of review -- plaintiff as public figure -- law of the case -- consideration on remand --

Headnote:

On certiorari from a state intermediate appellate court's affirmance of a summary judgment for the defense in a state-law defamation suit brought by a high school wrestling coach, review by the United States Supreme Court of whether allegedly defamatory statements concerning the coach and a public school superintendent were "constitutionally protected opinion" is not precluded--notwithstanding that the coach failed to establish actual malice, and, in a separate defamation suit brought by the school superintendent, the state's highest court suggested that the coach was a public figure--because (1) the statement made by the state's highest court in the superintendent's case concerning the coach's status as a public figure was dictum, and (2) the coach was not a party to the superintendent's suit and thus was not bound under state law by anything said in that case; in such a situation, the ruling of the state's highest court in a prior proceeding in the coach's suit that the coach was neither a public figure nor a public official presumably continues to be the law of the case on that issue, but the state's highest court is free to address the issue on remand.

[***HN3]

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

First Amendment -- requirement of fault in defamation suit -- alternative appellate decision -- consideration on remand --

Headnote:

The United States Supreme Court--on certiorari from a state intermediate appellate court's affirmance of a summary judgment for the defense in a state-law defamation suit on the ground that allegedly defamatory statements published in a newspaper were "constitutionally protected opinion"--will reject the defendants' contention that the state intermediate appellate court alternatively decided that there was no negligence in the case even if the plaintiff were regarded as a private figure--and that the suit is therefore precluded under the rule adopted in *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997 (stating that the Federal Constitution's First Amendment bars imposition of liability without fault in a state-law defamation suit brought by a private figure against a publisher or broadcaster of a defamatory falsehood)--where, although the state intermediate appellate court said that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,' " (1) that statement was immediately explained by the court's following statement that a recent ruling in a factually similar case had accorded the defendants in the instant case absolute immunity from liability, and (2) the court never made an evidentiary determination on the issue of the defendants' negligence; the state's highest court is free to address the issue of negligence on remand.

[***HN4]

adequate and independent state grounds -- consideration on remand --

Headnote:

A state's highest court, in holding that certain allegedly defamatory statements were "constitutionally protected opinion," does not evidence an intent to independently rest its decision on state-law grounds, where, although the court twice cites the state constitution in support of its ruling, the court (1) relies heavily on federal decisions interpreting the scope of Federal Constitution's First Amendment protection accorded defamation defendants, and (2) concludes that the allegedly defamatory statements were constitutionally protected opinion "both with respect to the federal Constitution and under our state Constitution"; under these circumstances, the decision is at least interwoven with federal law and is not clear on its face as to the court's intent to rely on independent state grounds, yet fails to make a plain statement that the federal cases did not themselves compel the result that the court reached; accordingly, where the intermediate appellate court of the same state--considering itself bound by the conclusion of the state's highest court that the allegedly defamatory statements were "constitutionally protected opinion"--subsequently affirms a summary judgment for the defense in a different defamation suit based on the same allegedly defamatory statements, review by the United States Supreme Court of the federal constitutional aspects of the state intermediate appellate court's decision is not barred under the rule concerning adequate and independent state grounds adopted in *Michigan v Long* (1983) 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469; the state's highest court is free to address the foregoing issues on remand.

[***HN5]

actual malice -- question of law --

Headnote:

The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.

[***HN6]

falsity -- liability for defamation --

Headnote:

The Federal Constitution's First Amendment requires that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved.

[***HN7]

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

defamation -- proof of falsity --

Headnote:

Under the rule that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection under the Federal Constitution's First Amendment from the application of state defamation laws, the issue of falsity relates to the defamatory facts implied by the statement; although the statement "I think Jones lied" may be provable as false on two levels--first, that the speaker really did not think Jones had lied but said it anyway, and second, that Jones really had not lied--it is the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

SYLLABUS: While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel per se. Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

1. The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, e. g., *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537, thus assuring that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 41 L. Ed. 2d 789, 94 S. Ct. 2997, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the *Gertz* dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see *Abrams v. United States*, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17. Simply couching a statement -- "Jones is a liar" -- in terms of opinion -- "In my opinion Jones is a liar" -- does not dispel the factual implications contained in the statement. Pp. 11-21.

2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, inter alia, his testimony before the OHSAA board with his subsequent testimony before the trial court. Pp. 21-22.

3. This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. Pp. 22-23.

COUNSEL: Brent L. English argued the cause for petitioner. With him on the brief was John D. Brown.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Richard D. Panza argued the cause for respondents. With him on the brief were William G. Wickens, David L. Herzer, Richard A. Naegele, P. Cameron DeVore, and Marshall J. Nelson. *

* Briefs of amici curiae urging affirmance were filed for Dow Jones & Co. et al. by Robert D. Sack, Richard J. Tofel, Richard M. Schmidt, Jr., Devereux Chatillon, Douglas P. Jacobs, Barbara L. Wartelle, Harvey L. Lipton, Laura R. Handman, Slade R. Metcalf, Richard J. Ovelmen, Deborah R. Linfield, Jane E. Kirtley, and Bruce W. Sanford; and for the American Civil Liberties Union et al. by Henry R. Kaufman.

Louis A. Colombo and David L. Marburger filed a brief for the Ohio Newspaper Association et al. as amici curiae.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 23.

OPINIONBY: REHNQUIST

OPINION: [*3] [***8] [**2697] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***HR1A] Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath [**2698] in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an odyssey of litigation spanning nearly 15 years. n1 Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High [*4] School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

-----Footnotes-----

n1 The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 88 L. Ed. 2d 305, 106 S. Ct. 322 (1985); *Lorain Journal Co. v. Milkovich*, 449 U.S. 966, 66 L. Ed. 2d 232, 101 S. Ct. 380 (1980).

-----End Footnotes-----

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced ". . . Diadiun says Maple told a lie." The column contained the following passages:

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

" . . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High [***9] School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

[*5] "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . . .

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." Milkovich v. News-Herald, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-1322 (1989). n2

-----Footnotes-----

n2 In its entirety, the article reads as follows:

"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

"It's not final yet -- the judge granted Maple only a temporary injunction against the ruling -- but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

"But there is something much more important involved here than whether Maple was denied due process by the OHSA, the basis of the temporary injunction.

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way -- many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position [sic] of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrences [sic] is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App. to Pet. for Cert. A138-A139.

-----End Footnotes-----

[*6] [***10] [**2699] Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the [*7] nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation [**2700] of coach and teacher, and constituted libel per se." App. 12. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). See App. 21-22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See *Milkovich v. Lorain Journal*, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979). The Ohio [*8] Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari. 449 U.S. 966, 101 S. Ct. 380, 66 L. Ed. 2d 232 (1980).

On remand, relying in part on our decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App. 55, and alternatively, as a public figure, petitioner had failed to [***11] make out a prima facie case of actual malice. *Id.*, at 55-59. The Ohio Court of Appeals affirmed both determinations. *Id.*, at 62-70. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 294-299, 473 N.E.2d 1191, 1193-1196 (1984). The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law." *Id.*, at 298-299, 473 N.E.2d at 1196-1197. This Court again denied certiorari. 474 U.S. 953 (1985).

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was "constitutionally protected opinion." *Scott v. News-Herald*, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 709 (1986). Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The Scott court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127, [*9]86 L. Ed. 2d 278, 105 S. Ct. 2662 (1985). See *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." *Ibid.* The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. *Id.*, at 250-252, 496 N.E.2d at 706-707. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.*, at 252, 496 N.E.2d at 707. n3 As for the fourth factor, the "broader context," the court reasoned that because the [**2701] article appeared on a sports page -- "a [***12] traditional haven for cajoling, invective, and hyperbole" -- the article would probably be construed as opinion. *Id.*, at 253-254, 496 N.E.2d at 708. n4

-----Footnotes-----

n3 The court continued:

"This position is borne out by the second headline on the continuation of the article which states: ' . . . Diadiun says Maple told a lie.' . . . The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie. . . . A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias. . . . While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." Scott, 25 Ohio St. 3d at 252-253, 496 N.E.2d at 707-708 (emphasis in original).

n4 Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page -- a traditional haven for cajoling, invective, and hyperbole. . . . In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper. . . . On balance . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." Id., at 253-254, 496 N.E.2d at 708.

-----End Footnotes-----

[*10]

***HR1B] ***HR2A] ***HR3A] ***HR4A] Subsequently, considering itself bound by the Ohio Supreme Court's decision in Scott, the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." 46 Ohio App. 3d at 23, 545 N.E.2d at 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, 493 U.S. 1055 (1990), to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse. n5

-----Footnotes-----

***HR2B]

n5 Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). First, respondents claim that the determination by the Ohio Supreme Court in Milkovich v. News-Herald, 15 Ohio St. 3d 292, 298, 473 N.E.2d 1191, 1196 (1984), that petitioner is not a public official or figure was overruled in Scott. Thus, since petitioner has failed to establish actual malice, his action is precluded under New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), and Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: "To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense," 25 Ohio St. 3d at 247, 496 N.E.2d at 704 (quoting Milkovich v. Lorain Journal Co., 474 U.S. 953, 964, 88 L. Ed. 2d 305, 106 S. Ct. 322 (1985) (BRENNAN, J., dissenting from denial of certiorari)), and "we overrule Milkovich in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." 25 Ohio St. 3d at 248, 496 N.E.2d at 704. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a party to the proceedings in Scott and thus would not be bound by anything in that ruling under Ohio law. See Hainbuchner v. Miner, 31 Ohio St. 3d 133, 137, 509 N.E.2d 424, 427 (1987) ("It is universally recognized that a former judgment, in order to be res judicata in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public-private figure question on remand from the Ohio Supreme

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Court in *Milkovich* (because it decided against petitioner on the basis of the opinion ruling in *Scott*), the ruling of the Ohio Supreme Court in *Milkovich* presumably continues to be law of the case on that issue. See *Hawley v. Ritley*, 35 Ohio St. 3d 157, 160, 519 N.E.2d 390, 393 (1988) ("The decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels").

[***HR3B]

Nor is there any merit to respondents' contention that the Court of Appeals below alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,'" *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 24, 545 N.E.2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the *Scott* ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App. 3d at 24, 545 N.E.2d at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

[***HR2C] [***HR3C] [***HR4B]

Next, respondents concede that the *Scott* court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see 25 Ohio St. 3d at 244, 496 N.E.2d at 701 ("We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution . . ."); *id.*, at 245, 496 N.E.2d at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution . . ."), thereby precluding federal review under *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). We similarly reject this contention. In the *Milkovich* proceedings below, the Court of Appeals relied completely on *Scott* in concluding that *Diadiun's* article was privileged opinion. See 46 Ohio App. 3d at 23-25, 545 N.E.2d at 1324-1325. *Scott* relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, e. g., 25 Ohio St. 3d at 244, 496 N.E.2d at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz v. Robert Welch, Inc.* . . ."), and concluded that "based upon the totality of circumstances it is our view that *Diadiun's* article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Id.*, at 254, 496 N.E.2d at 709. Thus, the *Scott* decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement . . . that the federal cases . . . [did] not themselves compel the result that the court . . . reached." *Long*, 463 U.S. at 1040-1041. Under *Long*, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

-----End Footnotes-----

[*11] [***13] [**2702] Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, *Law of Defamation* 5 (1978).

[*12] In Shakespeare's *Othello*, Iago says to Othello:

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash;
'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Robs me of that which not enriches him,
And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, *supra*, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e. g., Restatement [***14] of Torts § 558 (1938); Gertz [*13] v. Robert Welch, Inc., 418 U.S. at 370 (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, e. g., Restatement of Torts, *supra*, §§ 565-567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment a:

"Under the law of defamation, an expression of opinion could be defamatory if the [**2703] expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. . . . This position was maintained even though the truth or falsity of an opinion -- as distinguished from a statement of fact -- is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, *Law of Torts* § 5.28, p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made [*14] solely for the purpose of causing harm. See Restatement of Torts, *supra*, § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, *supra*, § 566, Comment a. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

[***HR1C] In 1964, we decided in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, that [HN1] the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280. [***15] This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech." *Gertz v. Robert Welch, Inc.*, *supra*, at 334 (quoting *New York Times*, *supra*, at 279).

Three years later, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967), a majority of the Court determined "that [HN2] the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.'" The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons "who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Gertz*, 418 U.S. at 336-337 [*15] (quoting *Butts*, 388 U.S. at 164 (Warren, C. J., concurring in result)). As Chief Justice Warren noted in concurrence, "our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Butts*, *supra*, at 164. The Court has also determined that both for public officials and public figures, a showing of *New York Times* malice is subject to a clear and convincing standard [**2704] of proof. *Gertz*, 418 U.S. at 342.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt, see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), the Court ultimately concluded that [HN3] the New York Times malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. *Gertz v. Robert Welch, Inc.*, supra. As we explained:

"Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

....

"[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." 418 U.S. at 344-345 (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See *id.*, at 347-348 ("This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury [*16] to reputation, [***16] yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of New York Times malice. See 418 U.S. at 350 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . .").

Still later, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986), we held that "the [HN4] common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.*, at 777. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.*, at 776. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." *Id.*, at 777-778.

We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of [*17] liability on such a basis was constitutionally impermissible -- that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*." *Id.*, at 13. [**2705] Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.*, at 13-14. See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin*, 418 U.S. 264, 284-286, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation [***17] action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

[***HR1D] [***HR5] The Court has also determined that "in [HN5] cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

of United States, Inc., 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (quoting New York Times, 376 U.S. at 284-286). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989).

[***HR1E] Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For [*18] this proposition they rely principally on the following dictum from our opinion in *Gertz*:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U.S. at 339-340 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See *Abrams v. United States*, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) (dissenting opinion) ("The ultimate good desired is better reached by free trade in ideas -- . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See *Cianci*, supra, at 62, n.10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of [***2706] facts which lead to the [***18] conclusion that Jones told an untruth. Even if the speaker states the facts [*19] upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" See *Cianci*, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Restatement (Second) of Torts*, § 566, Comment a (1977).

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the "'breathing space'" which "'freedoms of expression require in order to survive,'" *Hepps*, 475 U.S. at 772 (quoting *New York Times*, 376 U.S. at 272), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

[***HR1F] [***HR6] [***HR7A] Foremost, we think *Hepps* stands for the proposition that [HN6] a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant [*20] is involved. n6 Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. n7

-----Footnotes-----

n6 In Hepps the Court reserved judgment on cases involving nonmedia defendants, see 475 U.S. at 779, n.4, and accordingly we do the same. Prior to Hepps, of course, where public-official or public-figure plaintiffs were involved, the New York Times rule already required a showing of falsity before liability could result. 475 U.S. at 775.

[***HR7B]

n7 We note that [HN7] the issue of falsity relates to the defamatory facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

-----End Footnotes-----

[***19]

[***HR1G] Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Falwell, 485 U.S. at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See id., at 53-55.

[***HR1H] The New York Times-Butts-Gertz culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." New York Times, 376 U.S. at 270. Thus, [HN8] where a statement of "opinion" on a matter [**2707] of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault [*21] as required by Gertz. n8 Finally, the enhanced appellate review required by Bose Corp. provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." Bose Corp., 466 U.S. at 499 (quotation omitted).

-----Footnotes-----

[***HR1I]

n8 Of course, the limitations on presumed or punitive damages established by New York Times and Gertz also apply to the type of statements at issue here.

-----End Footnotes-----

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadum column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "The clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'"

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Scott, 25 Ohio St. 3d at 251, 496 N.E.2d at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSA board with his subsequent testimony before the trial court. As the Scott court noted regarding the plaintiff in that case: "Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at [*22] the [***20]hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." Id., at 252, 496 N.E.2d at 707. So too with petitioner Milkovich. n9

-----Footnotes-----

n9 In their brief, amici Dow Jones et al. urge us to view the disputed statements "against the background of a high profile controversy in a small community," and says that "they related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as Amici Curiae 27. We do not have the same certainty as do amici that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, amici err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

-----End Footnotes-----

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86, 15 L. Ed. 2d 597, 86 S. Ct. 669 [**2708] (1966). Justice Stewart in that case put it with his customary clarity:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

....

"The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. [*23] Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." 383 U.S. at 92-93 (concurring opinion).

[**HR1J] We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

DISSENTBY: BRENNAN

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion, notwithstanding any common-law protection, courts and commentators have struggled with [***21] the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986), only defamatory statements that are capable of being proved false are subject to liability under state libel law. See 497 U.S. at 16. n2 I also agree with the Court that the "statement" [*24] that the plaintiff must prove false under *Hepps* is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See 497 U.S. at 16-17 (discussing *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)).

-----Footnotes-----

n1 See, e. g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 292, n.30, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

n2 The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, see 497 U.S. at 16, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. See 475 U.S. at 779, n.4. I continue to believe that "such a distinction is 'irreconcilable with the fundamental First Amendment principle that 'the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.'"" Id., at 780 (BRENNAN, J., concurring) (citations omitted).

-----End Footnotes-----

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by existing First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." [**2709] 497 U.S. at 20. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see ante, at 22, and n.9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, e. g., *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (CA4 1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (CA8 1986); *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127, 86 L. Ed. 2d 278, 105 S. Ct. 2662 [***22] (1985).

[*25] With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." 497 U.S. at 17. See, e. g., *Bresler*, supra (metaphor); *Letter Carriers*, supra (hyperbole); *Falwell*, supra (parody). In *Bresler*, for example, we found that *Bresler* could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that *Bresler* was manipulative and extremely unreasonable. See ante, at 16-17. In *Letter Carriers*, we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See ante, at 17.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they imply the existence of false and defamatory facts. See ante, at 18-19. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention [*26] in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). Although statements of opinion may imply an assertion of a false and defamatory fact, they do not invariably do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See *Bresler*, supra; *Letter Carriers*, supra; *Falwell*, supra. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 62 L. Ed. 372, 38 S. Ct. 158 (1918).

For instance, the statement that "Jones is a liar," or the example [***23] given by the majority, "In my opinion John Jones is a liar" -- standing [***2710] alone -- can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See 497 U.S. at 18-19. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does [*27] not actually know whether Jones lied and does not have any other reasons for thinking he did. n3 Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages. n4

-----Footnotes-----

n3 The Restatement (Second) of Torts § 566, Comment c (1977), makes a similar observation. It explains that a statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.'"

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See ante, at 20, n.7; see generally Note, 13 Wm. Mitchell L. Rev. 545 (1987); Comment, 74 Calif. L. Rev. 1001 (1986); Zimmerman, *Curbing the High Price of Loose Talk*, 18 U. C. D. L. Rev. 359 (1985).

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

n4 See 497 U.S. at 20, n.7 (noting that under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986), "the issue of falsity relates to the defamatory facts implied by a statement" (emphasis changed)). Hepps mandates protection for speech that does not actually state or imply false and defamatory facts -- independently of the *Bresler-Letter Carriers-Falwell* line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that Hepps requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

-----End Footnotes-----

[*28] II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court [***24] hearing is patently conjecture. n5 The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. [**2711] I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See 497 U.S. at 5-7, n.2 (reproducing the column).

-----Footnotes-----

n5 Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie as to them. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

-----End Footnotes-----

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresentation [*29] "attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." Ante, at 6, n.2. Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to surmise. Diadiun says that it "seemed " that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that "probably" the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. Ante, at 7, n.2 (emphasis added). Then Diadiun guesses that by the time of the court hearing,

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

the two officials "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Ibid. (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described -- in evident contrast to Diadiun -- as having attended the proceeding. The column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in court. There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar." n6 For the first time, Diadiun [***25] fails [*30] to claim any firsthand knowledge, after stressing that he had personally attended both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." Ibid.

-----Footnotes-----

n6 The commissioner is quoted as having said: "I can say that some of the stories told to the judge sounded pretty darned unfamiliar It certainly sounded different from what they told us." Ante, at 7, n.2. This quotation might also be regarded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the officials discussed entirely different issues, rather than that they told a new lie.

-----End Footnotes-----

No reasonable reader could understand Diadiun to be impliedly asserting -- as fact -- that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed secondhand information about what Milkovich had said in court. Instead, [**2712] what suffices for "detail" and "color" are quotations from the OHSAA hearing -- old news compared to the court decision which prompted the column -- and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it. n7

-----Footnotes-----

n7 Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (CA4 1987), the court found that a disparaging statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion." For the same reason, the court in *Dunlap v. Wayne*, 105 Wash. 2d 529, 540, 716 P.2d 842, 849 (1986), concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also *National Assn. of Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 226, 396 N.E.2d 996, 1000 (1979) (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]").

The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame "himself rather than the subject of his remarks." Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1229 (1976) (quoting *Popham v. Pickburn*, 7 H. & N. 891, 898, 158 Eng. Rep. 730, 733 (Ex. 1862) (Wilde, B.)). "As Thomas Jefferson observed in his

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

first Inaugural Address . . . error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.'" Potomac, 829 F.2d at 1288-1289, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padover ed. 1943)).

-----End Footnotes-----

[*31] Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresentations [***26] he had made at the OHSAA hearing is preceded by the cautionary term "apparently" -- an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "Cautionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts. . . . In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'" Ollman v. Evans, 242 U.S. App. D.C. at 314, 750 F.2d at 983, quoting Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983). See also B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of [*32] fact rather than as a statement of opinion"); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 603, 552 P.2d 425, 429, 131 Cal. Rptr. 641 (1976) (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); *Stewart v. Chicago Title Ins. Co.*, 151 Ill. App. 3d 888, 894, 503 N.E.2d 580, 583, 104 Ill. Dec. 865 (1987) (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "anyone who [**2713] attended the meet . . . knows in his heart" that Milkovich lied -- obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Says." Even the headline on the page where the column is continued -- "Diadiun says Maple told a lie," 497 U.S. at 4 -- reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." *Mr. Chow of New York v. Ste. Jour Azur S. A.*, 759 F.2d 219, 227 (CA2 1985). Certain formats -- editorials, reviews, political cartoons, letters to the editor -- signal the reader to anticipate a departure from what is actually known by the author as fact. See *Ollman v. Evans*, supra, at 317, 750 F.2d at 986 ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); *R. Smolla, Law of Defamation* § 6.12(4), n.252 (1990) (collecting [*33] cases); *Zimmerman, Curbing the High Price of Loose Talk*, 18 U. C. D. L. Rev. 359, 442 (1985) (stressing the need to take into account "the cultural common [***27] sense of the ordinary listener or reader"). n8

-----Footnotes-----

n8 The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School -- home to the team that was allegedly mauled at the wrestling meet -- is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, e. g., *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d at 1290 (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (CA9 1980) (recognizing that statements in the early weeks of litigation by one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

-----End Footnotes-----

III

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hold the balance true," 497 U.S. at 23, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel "as a matter of constitutional law." Ante, at 17, quoting Bresler, 398 U.S. at 13. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court. n9

-----Footnotes-----

n9 Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances an insincere speculation would constitute a false and defamatory statement under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986). However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971) (quoting *New York Times*, 376 U.S. at 270). See also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-511, 80 L. Ed. 2d 502, 104 S. Ct. 1949, and n.29 (1984) (discussing the risks of submitting various questions to juries where freedom of speech is at stake); *Gertz*, 418 U.S. at 349 (expressing concern about juries punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); R. Smolla, *Law of Defamation* §§ 6.05(3)(a)-(c) (1990); Zimmerman, 18 U. C. D. L. Rev., at 430.

-----End Footnotes-----

[*34] [**2714] Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," 497 U.S. at 18, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the [***28] First Amendment." *Falwell*, 485 U.S. at 50. The public and press regularly examine the activities of those who affect our lives. "One of the prerogatives of American citizenship is the right to criticize men and measures." *Id.*, at 51 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-674, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944)). But often only some of the facts are known, and solely through insistent prodding -- through conjecture as well as research -- can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American [*35] leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Id.*, at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)).

497 U.S. 1, *, 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***, 1990 U.S. LEXIS 3296

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naivete of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume -- from the court's decision -- that such testimony must have been given.

Diadiun, therefore, is guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are [*36] offered.'" *New York Times*, supra, at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963)).

[***29] I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is [**2715] one we have chosen to tolerate in pursuit of "individual liberty [and] the common quest for truth and the vitality of society as a whole." *Falwell*, supra, at 50-51 (quoting *Bose Corp.*, 466 U.S. at 503-504). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 115 (CA2), cert. denied sub nom. *Edwards v. New York Times Co.*, 434 U.S. 1002, 54 L. Ed. 2d 498, 98 S. Ct. 647 (1977).

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying them. "Whatever is added to the field of libel is taken from the field of free debate." *New York Times*, 376 U.S. at 272 (quoting *Sweeney v. Patterson*, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458, cert. denied, 317 U.S. 678, 87 L. Ed. 544, 63 S. Ct. 160 (1942)). Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

REFERENCES:

50 Am Jur 2d, Libel and Slander 14

USCS, Constitution, Amendment 1

US L Ed Digest, Constitutional Law 947

Index to Annotations, First Amendment; Libel and Slander; Newspapers and Periodicals; New York Times Rule; Perjury

Annotation References:

Free speech and press clauses of Federal Constitution's First Amendment as affecting damages recoverable for defamation-- Supreme Court cases. 86 L Ed 2d 816.

Progeny of *New York Times v. Sullivan* in the Supreme Court. 61 L Ed 2d 975.

497 U.S. 1, *; 110 S. Ct. 2695, **;
111 L. Ed. 2d 1, ***; 1990 U.S. LEXIS 3296

Constitutional aspects of libel and slander-- Supreme Court cases. 28 L Ed 2d 885.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 ALR4th 987.

Libel by newspaper headlines. 95 ALR3d 660.

Libel and slander: who is a "public figure" in the light of Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997. 75 ALR3d 616.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 ALR3d 988.

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. 19 ALR3d 1361.

**Dale Nelson, Appellee/Cross-Appellant, v. J. C. Penney Company, Inc.,
Appellant/Cross-Appellee. Equal Employment Opportunity Commission, Amicus
Curiae.**

Nos. 95-1253/95-1305

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**75 F.3d 343; 1996 U.S. App. LEXIS 847; 69 Fair Empl. Prac. Cas. (BNA) 1328;
67 Empl. Prac. Dec. (CCH) P43,894**

September 13, 1995, Submitted

January 24, 1996, Filed

SUBSEQUENT HISTORY:

[**1] Rehearing and Suggestion for Rehearing En Banc Denied March 4, 1996, Reported at: 1996 U.S. App. LEXIS 3988.

PRIOR HISTORY:

Appeals from the United States District Court for the Northern District of Iowa. District No. 91-CV-4108. Honorable Donald O'Brien, District Judge.

This Opinion Substituted on Denial of Rehearing for Withdrawn Opinion of November 21, 1995, Previously Reported at: 1995 U.S. App. LEXIS 32597.

COUNSEL:

Counsel who presented argument on behalf of the appellant was P. Kevin Connelly of Chicago, IL. Michael J. Sheehan and Michael H. Cramer of Chicago appeared on the brief. Douglas L. Phillips of Sioux City, IA appeared on the brief.

Counsel who presented argument on behalf of the appellee was James C. Zalewski of Lincoln, NE. Emmanuel S. Bikakis of Sioux City, IA appeared on the brief.

JUDGES:

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINIONBY:

MORRIS SHEPPARD ARNOLD

OPINION:

[*344] MORRIS SHEPPARD ARNOLD, Circuit Judge.

Dale Nelson began working for J. C. Penney department stores in 1960. In 1983, he became the manager of a store in Iowa. In late 1990, he was transferred to become the manager of a smaller store in North Dakota. Four and a half months later, shortly after he turned 55, he was fired.

Mr. Nelson sued Penney in federal court in Iowa in late 1991, alleging age discrimination, retaliatory discharge (he had filed an age discrimination charge with the appropriate administrative agency a month before he was fired), and discharge in violation of the Employee Retirement Income Security Act (ERISA) (all under federal law), and disability discrimination, invasion of privacy, intentional infliction of emotional distress, and defamation (under Iowa law).

At an eight-day mixed jury/bench trial in mid-1993, the trial court dismissed [**2] the claims of invasion of privacy and intentional infliction of emotional distress for failure to state a claim. The trial court did not instruct the jury on the claim of defamation. The jury then found for Mr. Nelson on the age discrimination and retaliatory discharge claims. The trial court found for Penney on the claims of discharge in violation of ERISA and disability discrimination. See *Nelson v. J. C. Penney Co.*, 858 F. Supp. 914 (N.D. Iowa 1994). After denying post-trial motions, the trial court entered judgment for Mr. Nelson in the amount of approximately \$ 930,000. Both sides

appeal. We affirm in part and reverse in part and remand the case for the entry of the appropriate judgments.

I.

Penney contended that Mr. Nelson was fired, after repeated warnings, because of an abrasive and intimidating management style. Mr. Nelson contended that Penney's stated reason for firing him was merely a pretext for age discrimination. The trial court denied Penney's motions for judgment [*345] as a matter of law, both at trial and post-trial, on the age discrimination claim. Penney appeals those denials. In reviewing the denial of a defendant's motion for judgment as a matter of law in an [**3] age discrimination case submitted to a jury, we "focus on the ultimate factual issue of whether the employer intentionally discriminated against the employee on account of age." *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994). That process requires an evaluation of three different questions. *Id.* at 801.

First, we determine whether the plaintiff established a *prima facie* case -- i.e., that he was "within the protected age group, ... [that] he was performing his job at a level that met his employer's legitimate expectations, ... [that] he was discharged, and ... [that] his employer attempted to replace him." *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993). For the purposes of this appeal, we assume that Mr. Nelson established a *prima facie* case and thus created a presumption of unlawful age discrimination by Penney. *Nelson*, 26 F.3d at 801. The existence of that presumption placed an obligation upon Penney to rebut it, if possible. *Id.*

To rebut a presumption of unlawful age discrimination created by a plaintiff's *prima facie* case, an employer has to offer reasons for its actions that, if believed [**4] by a jury, would allow the jury to conclude that the plaintiff's age was not the reason for his termination. *Id.* Penney did so. There was evidence that many store managers older than Mr. Nelson were still working and had even been promoted. There was additional, and considerable, evidence of Mr. Nelson's difficulties in dealing with his employees in Iowa and of a continuation of those difficulties after his transfer to North Dakota (there was, moreover, no evidence that Penney failed to discipline younger store managers with the same or similar difficulties). Finally, both of the supervisors who participated in the decision to fire Mr. Nelson denied that his age was a factor in that decision.

Because Penney presented evidence of reasons other than age for its decision to terminate Mr. Nelson, it is considered to have rebutted his *prima facie* case. *Id.* The presumption of unlawful age discrimination therefore drops out of the case, *id.*, and we evaluate, last, only whether Mr. Nelson presented evidence "capable of

proving that the real reason for his termination was discrimination based on age." *Id.* Such evidence must include "conduct or statements by persons involved [**5] in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude" of an extent "sufficient to permit the [jury] to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Id.* at 800, quoting *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171, 182 (2d Cir. 1992). With that standard in mind, we examine the evidence offered by Mr. Nelson as the basis for his age discrimination claim. *Nelson*, 26 F.3d at 802.

We have read the entire trial transcript with care. As far as we can tell, Mr. Nelson presented four specific bases for his claim of age discrimination. The first was the fact that when he was transferred to North Dakota, and again when he was fired, his replacements were younger than he was. Then, late in 1990, around the time that Mr. Nelson was transferred to the store in North Dakota, the district manager for Iowa (Mr. Nelson's prior supervisor) called the district manager for North Dakota (Mr. Nelson's new supervisor) to advise him about Mr. Nelson's background. During that call, the district manager for North Dakota made notes, among which he included the information [**6] that Mr. Nelson was 54 years old. That inclusion was the second basis for Mr. Nelson's age discrimination claim. At a lunch in early 1991 attended by Mr. Nelson, his wife, the district manager for North Dakota, and two other Penney employees, the district manager told Mr. Nelson that he knew Mr. Nelson's age. That statement was the third basis for Mr. Nelson's age discrimination claim. Finally, although Mr. Nelson received negative comments on his management style from various supervisors earlier in his career, he was never otherwise disciplined or transferred because of them until he was 54 years old.

[*346] It is true that the replacements for Mr. Nelson at both stores were younger than he was; at the Iowa store, however, the age difference between Mr. Nelson and his successor was only one month. It is also true that the district manager for North Dakota wrote down Mr. Nelson's age when discussing him with the district manager for Iowa. But the fact that Mr. Nelson's replacement in North Dakota was significantly younger than he possesses, in our view, insufficient probative value to persuade a reasonable jury that Mr. Nelson was discriminated against. Such a fact is consistent with age [**7] discrimination, but it cannot alone support a reasonable inference of it. Nor do we believe that the fact that the district manager knew Mr. Nelson's age could furnish the basis for a reasonable inference that his age was a basis for his termination. A fact finder may not simply convert a condition that is necessary for a finding

of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such a finding.

We have said that in "some cases, evidence that an employer's proffered nondiscriminatory explanation is wholly without merit or obviously contrived might serve double duty, ... permitting an inference that age discrimination was a motivating factor in a plaintiff's termination." *Id.* at 801. This is not such a case. There was no conflicting testimony or other substantial evidence of deviousness on the part of the employer, see *id.* at 802, from which a reasonable fact finder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual. See also *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110 (8th Cir. 1994), cert. denied, 130 L. Ed. 2d 310, 115 S. Ct. 355 (1994). We do not think that the simple fact that the employer's [**8] testimony is necessarily self-interested is enough under our previous cases to allow the jury to find that the employer's proffered reasons were pretextual. If it were, then any case in which the plaintiff makes a prima facie case is a submissible one because it must go to the jury whether or not the employer produces bona fide reasons for its actions -- and we have never held that. Mr. Nelson's personnel file did contain occasional comments from earlier supervisors about his need to improve his relationships with his employees. There is no evidence in the record, however, showing that any of those remarks was preceded by the number, intensity, or scope of employee complaints that occurred in the year before Mr. Nelson was fired.

In view of all of these circumstances, and considering the insubstantial character of the evidence presented with respect to age discrimination, we cannot agree with the trial court that Mr. Nelson established a submissible case that age "actually motivated" Penney's decision to fire him. *Nelson*, 26 F.3d at 800, quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 1706, 123 L. Ed. 2d 338 (1993) (emphasis supplied in *Nelson*). We see no evidence "directly reflecting [**9] the alleged discriminatory attitude." *Nelson*, 26 F.3d at 800, quoting *Ostrowski*, 968 F.2d at 182. We therefore vacate the judgment on the age discrimination claim and remand the case for the entry of judgment for Penney on that claim.

II.

The evidence of retaliatory discharge was even less substantial, consisting only of the facts that Mr. Nelson was fired a month after filing an age discrimination charge with the appropriate administrative agency and that both of the supervisors involved in firing Mr. Nelson knew of that charge. There is no evidence in the record that others who filed age discrimination charges were

fired, that Mr. Nelson's supervisors discussed the filing with each other, or that either of them even commented to Mr. Nelson on that filing. There was considerable evidence, moreover, that Mr. Nelson was reprimanded several times and was given a final warning about the status of his job before his supervisors knew of the age discrimination charge.

In light of all of these circumstances, we cannot agree with the trial court that the mere coincidence of timing established a submissible case of retaliatory discharge. See, e.g., *Caudill v. Farmland [**10] Industries, Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (close temporal proximity between filing of age discrimination charges and firing of plaintiff was [**347] only a "slender reed of evidence" for which "rank speculation" would be required to assume causal connection between the two events, in light of other evidence presented); see also *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir. 1991), cert. denied, 502 U.S. 940, 116 L. Ed. 2d 327, 112 S. Ct. 376 (1991) ("inference based on timing alone" was insufficient in light of other evidence presented). We therefore vacate the judgment on the retaliatory discharge claim and remand the case for the entry of judgment for Penney on that claim.

III.

Mr. Nelson cross-appeals the trial court's judgment for Penney on his claims of discharge in violation of ERISA and disability discrimination. We have carefully read the entire trial transcript. We see no basis for vacating those judgments.

IV.

Mr. Nelson's claim under state law for invasion of privacy was based on a supervisor's opening of Mr. Nelson's locked desk at the North Dakota store in his absence to obtain his personnel file. The trial court dismissed that claim on the first day of trial, stating that the alleged [**11] tort had occurred in North Dakota and that no such tort is or would be recognized in North Dakota. Mr. Nelson cross-appeals that dismissal.

The North Dakota Supreme Court has acknowledged that in the states where the tort of invasion of privacy is recognized, it usually takes one or more of four forms -- "(1) appropriation of a name or picture for commercial purposes without written consent; (2) intrusion upon one's solitude or seclusion; (3) public disclosure of private information which is not necessarily defamatory; and (4) placing a person in a false light ... in otherwise legitimate news stories." *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578 n.3 (N.D. 1981). In at least two cases, the North Dakota Supreme Court has assumed for the sake of argument that a cause of action may exist for commercial appropriation of a

name without consent but has sidestepped the question of the actual existence of that tort by finding consent to use of the name. See *American Mutual Life Insurance Co. v. Jordan*, 315 N.W.2d 290, 296 (N.D. 1982), and *Volk v. Auto-Dine Corp.*, 177 N.W.2d 525, 529 (N.D. 1970). In at least one case, that court has assumed for the sake [**12] of argument that a cause of action may exist for public disclosure of private information but has sidestepped the question of the actual existence of that tort by finding no evidence of proximate cause. See *Schleicher v. Western State Bank*, 314 N.W.2d 293, 296 (N.D. 1982).

We have found no authority, however (and have been directed to none), that would allow us to conclude that North Dakota might recognize a cause of action for the type of intrusion into a person's solitude or seclusion of which Mr. Nelson complains. Indeed, although it has been given a number of opportunities to hold that some types of invasion of privacy are actionable, the Supreme Court of North Dakota has consistently refused to do so. We believe that the trial court therefore correctly decided that this studied reluctance does not bode well for the acceptance of this kind of cause of action in North Dakota in the future. Accordingly, we decline to disturb the trial court's ruling with respect to the claim for invasion of privacy.

In his reply brief, Mr. Nelson argues that Penney never pleaded the applicability of North Dakota law and, therefore, that the law of Iowa (where the case was tried) should have [**13] been applied. That argument might prevail in the Iowa state courts (a question upon which we express no opinion), but Mr. Nelson sued in federal court, where pleadings are governed by the federal rules. See, e.g., *Bank of St. Louis v. Morrissey*, 597 F.2d 1131, 1134-35 (8th Cir. 1979); see also *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698-99 (8th Cir. 1979) ("a federal court cannot be bound by a state's technical pleading rules"). "The federal courts are required to take judicial notice of the laws of every state of the union. Consequently, it is not necessary to plead state law, whether it be the forum state's law or the law of another state." See 5 C. Wright and A. Miller, *Federal Practice and Procedure: Civil 2d* § 1253 at 357-58 (1990). Since Mr. Nelson does not contend [**14] that the trial court interpreted Iowa conflicts law improperly, we reject the argument that Penney's failure to plead the applicability of North Dakota law deprives Penney of the benefit of that law on the claim for invasion of privacy.

V.

Mr. Nelson had serious health problems beginning in mid-1989. His claim under state law for intentional infliction of emotional distress was based [**14] on Penney's transferring him to North Dakota "with wanton

disregard for [his] physical and mental health." The trial court dismissed that claim on the first day of trial, stating that because Mr. Nelson had no expert testimony to offer on the question of emotional distress, he could not prevail, as a matter of law. Mr. Nelson cross-appeals that dismissal.

In dismissing this claim, the trial court relied on *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) (en banc), in which the Iowa Supreme Court held that when physical problems are alleged to have derived from emotional distress, expert testimony is required. We are dubious about the applicability of *Vaughn* in the absence of claims for physical problems consequent to emotional distress (and Mr. Nelson evidently does not allege any such physical problems). We note, however, that Mr. Nelson made no argument in the trial court (or, for that matter, in his briefs on cross-appeal) that *Vaughn* did not apply or that his claim for intentional infliction of emotional distress could survive based solely on his subjective reaction to his transfer. Indeed, Mr. Nelson's lawyer stated at trial, with respect to [**15] *Vaughn*, that he had no "contrary authority" and that *Vaughn* appeared to control ("that appears to be the Iowa law as far as what the cases have said"). Such a concession amounts, in our view, to a waiver (or an abandonment) of Mr. Nelson's claim for intentional infliction of emotional distress.

On cross-appeal, moreover, Mr. Nelson offers arguments based on the sufficiency of the evidence on his claim for intentional infliction of emotional distress. He made none of those arguments in the trial court, as far as we can tell. Under all of these circumstances, we decline to disturb the trial court's ruling on Mr. Nelson's claim for intentional infliction of emotional distress. See, e.g., *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1304 (8th Cir. 1995).

VI.

Mr. Nelson's defamation claim was based on the alleged compelled self-publication by Mr. Nelson to two of his employees of statements about himself -- but written by Penney -- that Mr. Nelson considered defamatory. He submitted two proposed jury instructions on defamation before trial. After the close of the evidence, the trial court gave to the parties a set of proposed jury instructions. No instruction on [**16] defamation was included in that set.

During the jury instructions conference, the trial court asked the parties to specify, with respect to the set given to them, both the instructions objected to and any instructions omitted but still requested. The lawyer for Mr. Nelson asked for the addition of two jury instructions, neither of which related to defamation, and stated that he had "no other problems" with the trial

court's set. On at least five other occasions, Mr. Nelson's lawyer repeated that he was "done," that he had "nothing else," that the trial court's set seemed "fine," that he could not "think of anything else," and that he had no further "problems or any record ... to make ... or anything else" to bring up with the trial court.

By his lawyer's explicit acceptance of the trial court's proposed jury instructions and his failure to offer during the jury instructions conference any additional instructions on defamation, Mr. Nelson abandoned his defamation claim. We therefore reject his argument on

cross-appeal that the defamation claim should have been submitted to the jury.

VII.

For the reasons stated, we affirm the trial court with respect to all of Mr. Nelson's claims [**17] except age discrimination and retaliatory discharge. We vacate the judgments on [*349] those claims, as well as the associated judgments awarding attorney's fees, and remand the case for the entry of judgment for Penney on all claims.

NEW YORK TIMES CO. v. SULLIVAN
No. 39

SUPREME COURT OF THE UNITED STATES

376 U.S. 254; 84 S. Ct. 710; 11 L. Ed. 2d 686; 1964 U.S.LEXIS 1655; 95 A.L.R.2d 1412; 1 Media L. Rep. 1527

January 6, 1964, Argued
March 9, 1964, Decided *

* Together with No. 40, *Abernathy et al. v. Sullivan*, also on certiorari to the same court, argued January 7, 1964.

PRIOR HISTORY:

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

DISPOSITION: 273 Ala. 656, 144 So. 2d 25, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner newspaper sought review of a decision by the Supreme Court of Alabama upholding a judgment awarding respondents damages in a civil libel action.

OVERVIEW: Petitioner newspaper sought review of a decision upholding a judgment awarding respondents damages in a civil libel action. The Court held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide petitioner the safeguards for freedom of speech and of the press that were guaranteed by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. The Court held that petitioner's constitutional guarantees required a rule that prohibited a public official from recovering damages for a defamatory falsehood relating to the public official's official conduct unless the official proved that the statement was made with actual malice. The Court defined actual malice as knowledge that the defamatory statement was false or made with reckless disregard of whether it was false or not. Further, the Court held that under the proper safeguards, the evidence presented against petitioner was constitutionally insufficient to support the judgment for respondent. Respondent presented no evidence to show petitioner was aware of erroneous statements or was in any way reckless in that regard.

OUTCOME: The Court reversed the judgment and remanded the case.

CORE TERMS: advertisement, libel, First Amendment, actual malice, punitive damages, public official, duty, malice, police department, governor, libelous, candidate, Fourteenth Amendment, newspaper, reputation, criticize, public affairs, Fourteenth Amendments, Sedition Act, safeguard, police commissioner, retraction, freedom of speech, campus, demonstration, presumed, protest, falsity, contempt, publish

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Libel

[HN1] Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Ala. Code tit. 7, § 914.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Freedom of the Press

Constitutional Law: Substantive Due Process: Scope of Protection

[HN2] The rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First Amendment and Fourteenth Amendment in a libel action brought by a public official against critics of his official conduct.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN3] The test in constitutional scrutiny is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Commercial Speech

[HN4] If allegedly libelous statements would otherwise be constitutionally protected from judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

Torts: Defamation & Invasion of Privacy: Libel

[HN5] Under Alabama law, a publication is libelous per se if the words tend to injure a person in his reputation or to bring him into public contempt; the standard is met if the words are such as to injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust. The jury must find that the words were published of and concerning the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once libel per se has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars.

Torts: Defamation & Invasion of Privacy: Libel

[HN6] Under Alabama law, a defendant's privilege of fair comment for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN7] The Constitution does not protect libelous publications.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN8] When statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN9] The Court retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel; for public men, are, as it were, public property, and discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN10] Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in the Supreme Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN11] The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by the Court's decisions. The constitutional safeguard, the Court has said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN12] The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN13] The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN14] Debate on public issues should be uninhibited, robust, and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN15] Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN16] First Amendment protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Freedom of the Press

[HN17] Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.

Constitutional Law: Fundamental Freedoms: Freedom of Religion

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN18] In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN19] Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

[HN20] Whatever is added to the field of libel is taken from the field of free debate.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN21] Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, the Supreme Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains half-truths and misinformation. Such repression can be justified, if at all,

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

only by a clear and present danger of the obstruction of justice. If judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN22] If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

Constitutional Law: Substantive Due Process: Scope of Protection

[HN23] It is true that the First Amendment was originally addressed only to action by the federal government, and that Jefferson, for one, while denying the power of Congress to control the freedom of the press, recognized such a power in the states. But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the states of the First Amendment restrictions.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN24] What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.

Criminal Law & Procedure: Criminal Offenses: Crimes Against the Person

[HN25] Alabama has a criminal libel law which subjects to prosecution any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude, and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Ala. Code, tit. 14 § 350.

Constitutional Law: Procedural Due Process: Double Jeopardy

[HN26] There is no double-jeopardy limitation applicable to civil lawsuits.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN27] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN28] Constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Political Speech

[HN29] It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

[HN30] Any one claiming to be defamed by a communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN31] The Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct.

Evidence: Procedural Considerations: Inferences & Presumptions

[HN32] The power to create presumptions is not a means of escape from constitutional restrictions.

Civil Procedure: Appeals: U.S. Supreme Court Review

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN33] The Supreme Court's duty is not limited to the elaboration of constitutional principles; the Court must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. Particularly where the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated. In cases where that line must be drawn, the rule is that the Court will examine the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect.

Constitutional Law: Trial by Jury in Civil Actions

[HN34] See U.S. Const. amend. VII.

Civil Procedure: Appeals: U.S. Supreme Court Review: State Court Decisions

Constitutional Law: Trial by Jury in Civil Actions

[HN35] The U.S. Const. amend. VII ban on re-examination of facts does not preclude the Court from determining whether governing rules of federal law have been properly applied to the facts. The Supreme Court will review the finding of facts by a State court where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Defamation

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

[HN36] No court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.

Constitutional Law: Substantive Due Process: Scope of Protection

[HN37] Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice.

SUMMARY: The present action for libel was brought in the Circuit Court of Montgomery County, Alabama, by a city commissioner of public affairs whose duties included the supervision of the police department; the action was brought against the New York Times for publication of a paid advertisement describing the maltreatment in the city of Negro students protesting segregation, and against four individuals whose names, among others, appeared in the advertisement. The jury awarded plaintiff damages of \$500,000 against all defendants, and the judgment on the verdict was affirmed by the Supreme Court of Alabama (273 Ala 656, 144 So 2d 25) on the grounds that the statements in the advertisement were libelous per se, false, and not privileged, and that the evidence showed malice on the part of the newspaper; the defendants' constitutional objections were rejected on the ground that the First Amendment does not protect libelous publications.

On writs of certiorari, the Supreme Court of the United States reversed the judgment below and remanded the case to the Alabama Supreme Court. In an opinion by Brennan, J., expressing the views of six members of the Court, it was held that (1) the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide the safeguards for freedom of speech and press that are required by the constitutional guaranty in a libel action brought by a public official against critics of his official conduct, and in particular, for failure to provide a qualified privilege for honest misstatements of fact, defeasible only upon a showing of actual malice; and (2) under the proper standards the evidence presented in the case was constitutionally insufficient to support the judgment for plaintiff.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Black, J., joined by Douglas, J., and Goldberg, J., joined by Douglas, J., concurred in the result in separate opinions. The concurring opinions expressed the view that the constitutional guaranty of free speech and press afforded the defendants an absolute, unconditional privilege to publish their criticism of official conduct.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

freedom of speech and press -- attack on public officials --

Headnote:

State rules of law governing a libel action brought by a public official against critics of his official conduct are constitutionally deficient where these rules fail to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in such an action, and evidence disregarding the proper safeguards is constitutionally insufficient to support a judgment for the plaintiff.

[***HN2]

from state court -- jurisdiction over foreign corporation --

Headnote:

A contention of a foreign corporation that the assumption of jurisdiction over its corporate person by a state court overreaches the territorial limits of the due process clause is foreclosed from United States Supreme Court review by a ruling of the state courts, not lacking fair or substantial support in prior state court decisions, that the corporation entered a general appearance in the action and thus waived its jurisdictional objection.

[***HN3]

Fourteenth Amendment -- what is state action --

Headnote:

The rule that the Fourteenth Amendment is directed against state action and not private action has no application where the state courts in a civil lawsuit have applied a state rule of law which is claimed to impose invalid restrictions on a party's constitutional freedoms of speech and press; it matters not that the state law has been applied in a civil action between private parties and that it is common law only, though supplemented by statute.

[***HN4]

Fourteenth Amendment -- test of state action --

Headnote:

In determining whether the Fourteenth Amendment is violated by state action, the test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

[***HN5]

freedom of speech and press --

Headnote:

The First Amendment secures the widest possible dissemination of information from diverse and antagonistic sources.

[***HN6]

freedom of speech and press -- libelous statement --

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Headnote:

An allegedly libelous statement does not forfeit its protection under the constitutional guaranty of freedom of speech and press merely because it was published in the form of a paid advertisement.

[***HN7]

freedom of speech and press -- libel laws -- criticism of public officials --

Headnote:

Judicial statements to the effect that the Federal Constitution does not protect libelous publications do not foreclose the United States Supreme Court from measuring, by standards satisfying the First Amendment, the use of libel laws to impose sanctions upon expressions critical of the official conduct of public officials.

[***HN8]

freedom of speech and press -- libel --

Headnote:

Like "insurrection," contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in the United States Supreme Court as violating the constitutional guaranty of freedom of speech and press, libel can claim no talismanic immunity from constitutional limitations.

[***HN9]

freedom of speech and press -- public questions --

Headnote:

Freedom of expression upon public questions is secured by the First Amendment.

[***HN10]

freedom of speech and press --

Headnote:

The protection given free speech and press by the Federal Constitution was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

[***HN11]

freedom of speech --

Headnote:

It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion.

[***HN12]

freedom of speech -- attack on government and public officials --

Headnote:

The First Amendment requires that debate on public issues should be uninhibited, robust, and wide open, and such debate may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

[***HN13]

freedom of speech -- attack on public official -- truth of statements --

Headnote:

An advertisement published in a newspaper describing the maltreatment in an Alabama city of Negro students protesting segregation qualifies for the First Amendment's protection and does not forfeit that protection merely because of the falsity of some of its factual statements and its alleged defamation of a city official; the First Amendment does not recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials, and especially not one that puts the burden of proving truth on the speaker.

[***HN14]

freedom of speech --

Headnote:

The protection of the constitutional guaranty of freedom of speech and press does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.

[***HN15]

freedom of speech -- attack on public officials --

Headnote:

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error; criticism of official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes official reputations.

[***HN16]

attack on official conduct --

Headnote:

Since neither factual error nor defamatory content suffices to remove the protection of the constitutional guaranty of freedom of speech and press from criticism of official conduct, the combination of the two elements is no less inadequate.

[***HN17]

freedom of speech and press -- applicability to states --

Headnote:

The Fourteenth Amendment makes the First Amendment applicable to the states.

[***HN18]

freedom of speech -- libel --

Headnote:

What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.

[***HN19]

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

freedom of speech -- libel -- defense of truth --

Headnote:

A state law of civil libel which infringes the constitutional guaranty of freedom of speech and press is not saved by its allowance of the defense of truth.

[***HN20]

attack on public officials -- necessity of actual malice --

Headnote:

The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments.

[***HN21]

freedom of speech -- attack on public officials -- presumption of malice --

Headnote:

A presumption of malice where general damages in a libel action are concerned is, as applied to a libel action brought by a public official against critics of his official conduct, inconsistent with the constitutional guaranty of freedom of speech and press, which affords the defendant a qualified privilege of honest mistake.

[***HN22]

presumptions --

Headnote:

The power of the legislature to create presumptions is not a means of escape from constitutional restrictions.

[***HN23]

reversal -- uncertainty of verdict --

Headnote:

A state judgment affirming a judgment for a public official in his libel action against critics of his official conduct must be reversed by the United States Supreme Court where state law, inconsistent with the requirement of the constitutional guaranty of freedom of speech and press, presumes malice insofar as general damages are concerned, the trial judge did not instruct the jury to differentiate between general and punitive damages, and in view of the general verdict returned by the jury it is impossible to know whether the verdict was wholly an award of one or the other.

[***HN24]

from state court -- libel action of public official -- review of evidence --

Headnote:

Considerations of effective judicial administration require the United State Supreme Court to review the evidence in the record for the purpose of determining whether it could constitutionally support a judgment for a public official in his state court libel action against critics of his official conduct, where the judgment is reversed on the ground that the state law applied violates the constitutional guaranty of freedom of speech and press, and the official may seek a new trial.

[***HN25]

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

from state court -- review of evidence --

Headnote:

Upon review of a state court judgment, the United States Supreme Court's duty is not limited to the elaboration of constitutional principles; the Court must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.

[***HN26]

from state court -- review of evidence -- freedom of speech and press --

Headnote:

On review of a state court judgment in cases in which a line must be drawn between speech unconditionally guaranteed and speech which may legitimately be regulated, the United States Supreme Court examines for itself the statements in issue and the circumstances under which they were made to see whether they are of a character protected by the constitutional guaranty of freedom of speech; the Court must make an independent examination of the whole record so as to assure itself that the judgment below does not constitute a forbidden intrusion on the field of free expression.

[***HN27]

Seventh Amendment -- applicability to state cases --

Headnote:

The Seventh Amendment, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, is applicable to state cases coming to the United States Supreme Court.

[***HN28]

Seventh Amendment -- review of facts by United States Supreme Court --

Headnote:

The Seventh Amendment's ban on re-examination of facts tried by a jury does not preclude the United States Supreme Court from determining whether governing rules of federal law have been properly applied to the facts.

[***HN29]

from state court -- review of findings of fact --

Headnote:

The United States Supreme Court will review the findings of fact by a state court where conclusions of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

[***HN30]

sufficiency -- malice --

Headnote:

In a libel action brought in a state court by a public official against signers of a newspaper advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence does not constitutionally sustain a judgment for the plaintiff, where, assuming that the defendants could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

[***HN31]

libel -- inference of malice --

Headnote:

In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, a statement by the secretary of the newspaper that he thought that the advertisement was substantially correct affords no constitutional warrant for inferring actual malice from his ignoring the falsity of the advertisement, where his opinion was at least a reasonable one, and there was no evidence to impeach his good faith.

[***HN32]

libel -- inference of malice --

Headnote:

In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, the newspaper's failure to retract upon plaintiff's demand is not adequate evidence of actual malice for constitutional purposes, even though the newspaper later retracted upon the demand of the governor of Alabama.

[***HN33]

libel against newspaper -- inference of malice --

Headnote:

In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, evidence that the newspaper published the advertisement without checking its accuracy against the news stories in its own files is not adequate evidence of actual malice for constitutional purposes, where the record shows that the employees of the newspaper having responsibility for the publication of the advertisement relied upon their knowledge of the good reputation of many of the signers of the advertisement and upon a letter from a person known to them as a responsible individual, certifying that the use of the names of the signers was authorized; evidence supporting a finding of negligence in failing to discover the misstatements in the advertisement is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

[***HN34]

libel -- identifying defamed person --

Headnote:

In a libel action brought in a state court by a city commissioner of public affairs against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, the evidence is constitutionally incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" plaintiff, where (1) there was no reference to the plaintiff in the advertisement either by name or official position, (2) the statements in the advertisement could not reasonably be read as accusing plaintiff of personal involvement in the acts described therein, (3) these statements, although possibly referring to the police, did not on their face make even an oblique reference to plaintiff as an individual, and (4) none of the plaintiff's witnesses suggested any basis for the belief that plaintiff himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the police department and thus bore official responsibility for police conduct.

[***HN35]

libel of government and government officials --

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Headnote:

Prosecution for libel on government has no place in the American system of jurisprudence, and this rule cannot be sidestepped by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.

[***HN36]

defamation of police commissioner -- fair comment --

Headnote:

In the absence of a showing of actual malice, recovery in a libel action brought by a police commissioner against critics of his ability to run the police department is precluded by the doctrine of fair comment.

[***HN37]

free speech -- defamation of public official --

Headnote:

Since in an action brought by a public official against critics of his official conduct the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact, both defenses being defeasible if the public official proves actual malice.

[***HN38]

freedom of speech -- attack on government operations as attack on government officials --

Headnote:

The constitutional guaranty of freedom of speech and press precludes an otherwise impersonal attack on governmental operations from being treated as a libel of an official responsible for those operations.

SYLLABUS: Respondent, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in corporate petitioner's newspaper, the text of which appeared over the names of the four individual petitioners and many others. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages, and that for the purpose of compensatory damages malice was presumed, so that such damages could be awarded against petitioners if the statements were found to have been published by them and to have related to respondent. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice and would not justify an award of punitive damages; he refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for respondent should differentiate between compensatory and punitive damages. The jury found for respondent and the State Supreme Court affirmed. Held: A State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice" -- that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Pp. 265-292.

(a) Application by state courts of a rule of law, whether statutory or not, to award a judgment in a civil action, is "state action" under the Fourteenth Amendment. P. 265.

(b) Expression does not lose constitutional protection to which it would otherwise be entitled because it appears in the form of a paid advertisement. Pp. 265-266.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

(c) Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless "actual malice" -- knowledge that statements are false or in reckless disregard of the truth -- is alleged and proved. Pp. 279-283.

(d) State court judgment entered upon a general verdict which does not differentiate between punitive damages, as to which under state law actual malice must be proved, and general damages, as to which it is "presumed," precludes any determination as to the basis of the verdict and requires reversal, where presumption of malice is inconsistent with federal constitutional requirements. P. 284.

(e) The evidence was constitutionally insufficient to support the judgment for respondent, since it failed to support a finding that the statements were made with actual malice or that they related to respondent. Pp. 285-292.

COUNSEL: Herbert Wechsler argued the cause for petitioner in No. 39. With him on the brief were Herbert Brownell, Thomas F. Daly, Louis M. Loeb, T. Eric Embry, Marvin E. Frankel, Ronald S. Diana and Doris Wechsler.

William P. Rogers and Samuel R. Pierce, Jr. argued the cause for petitioners in No. 40. With Mr. Pierce on the brief were I. H. Wachtel, Charles S. Conley, Benjamin Spiegel, Raymond S. Harris, Harry H. Wachtel, Joseph B. Russell, David N. Brainin, Stephen J. Jelin and Charles B. Markham.

M. Roland Nachman, Jr. argued the cause for respondent in both cases. With him on the brief were Sam Rice Baker and Calvin Whitesell.

Briefs of amici curiae, urging reversal, were filed in No. 39 by William P. Rogers, Gerald W. Siegel and Stanley Godofsky for the Washington Post Company, and by Howard Ellis, Keith Masters and Don H. Reuben for the Tribune Company. Brief of amici curiae, urging reversal, was filed in both cases by Edward S. Greenbaum, Harriet F. Pilpel, Melvin L. Wulf, Nanette Dembitz and Nancy F. Wechsler for the American Civil Liberties Union et al.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINIONBY: BRENNAN

OPINION: [*256] [***692] [**713] MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So. 2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. n1 Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by [***693] an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding [*257] paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

-----Footnotes-----

n1 A copy of the advertisement is printed in the Appendix.

-----End Footnotes-----

The text appeared over the names of 64 persons, many widely known for their [**714]activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have [*258] assaulted his person. They have arrested him seven times -- for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' -- a felony under which they could imprison him for ten years. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. n2 As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with [***694] "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

-----Footnotes-----

n2 Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

-----End Footnotes-----

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My [*259] Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on [**715] a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

[*260] Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. n3 One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

-----Footnotes-----

n3 Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

-----End Footnotes-----

The cost of the advertisement was approximately \$4800, and it was [***695]published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability [*261] Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it [**716] bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

[HN1] Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the [*262]Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, [***696] finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman" On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages -- as distinguished from "general" damages, which are compensatory in nature -- apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention [*263] that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

[**717] In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So. 2d 25. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury . . . , such injury being implied." Id., at 673, 676, 144 So. 2d at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." Id., at 674-675, 144 So. 2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then [***697] known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that, [*264] apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." Id., at 686-687, 144 So. 2d at 50-51. The court reaffirmed a statement in an

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

earlier opinion that "There is no legal measure of damages in cases of this character." Id., at 686, 144 So. 2d at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." Id., at 676, 144 So. 2d at 40.

[***HR1] Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946. We reverse the judgment. We hold that [HN2] the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. n4 [**718] [*265] We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

[***HR2]

-----Footnotes-----

n4 Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See *Thompson v. Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 454-458.

-----End Footnotes-----

I.

[***HR3] [***HR4] We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e. g., Alabama Code, Tit. 7, §§ 908-917. [HN3] The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia*, 100 U.S. 339, 346-347; [***698] *American Federation of Labor v. Swing*, 312 U.S. 321.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U.S. 52, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating [*266] information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

[***HR5] [***HR6] The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N. A. A. C. P. v. Button*, 371 U.S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California*, 361 U.S. 147, 150; cf. *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities -- who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin*, 303 U.S. 444, 452; *Schneider v. State*, 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20. [**719] To avoid placing such a handicap upon the freedoms of expression, we hold that [HN4] if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement. n5

-----Footnotes-----

n5 See American Law Institute, *Restatement of Torts*, § 593, Comment b (1938).

-----End Footnotes-----

[*267] II.

[HN5] Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust" The jury [***699] must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 494-495, 124 So. 2d 441, 457-458 (1960). [HN6] His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis*, supra, 271 Ala., at 495, 124 So. 2d, at 458.

[*268] The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

[***HR7] [***HR8] Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that [HN7] the Constitution does not protect libelous publications. n6 Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp v. Florida*, 328 U.S. 331, 348-349, that " [HN8] when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais v. Illinois*, 343 U.S. 250, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that [HN9] it "retains and [**720] exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

men, are, as it were, public property, " and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Id.*, at 263-264, and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the [***700] Court was equally divided and the question was not decided. *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642. [*269] In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. *N. A. A. C. P. v. Button*, 371 U.S. 415, 429. [HN10] Like insurrection, n7 contempt, n8 advocacy of unlawful acts, n9 breach of the peace, n10 obscenity, n11 solicitation of legal business, n12 and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

-----Footnotes-----

n6 *Konigsberg v. State Bar of California*, 366 U.S. 36, 49, and n. 10; *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48; *Roth v. United States*, 354 U.S. 476, 486-487; *Beauharnais v. Illinois*, 343 U.S. 250, 266; *Pennekamp v. Florida*, 328 U.S. 331, 348-349; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572; *Near v. Minnesota*, 283 U.S. 697, 715.

n7 *Herndon v. Lowry*, 301 U.S. 242.

n8 *Bridges v. California*, 314 U.S. 252; *Pennekamp v. Florida*, 328 U.S. 331.

n9 *De Jonge v. Oregon*, 299 U.S. 353.

n10 *Edwards v. South Carolina*, 372 U.S. 229.

n11 *Roth v. United States*, 354 U.S. 476.

n12 *N. A. A. C. P. v. Button*, 371 U.S. 415.

-----End Footnotes-----

[***HR9] [***HR10] [***HR11] [HN11] The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. " [HN12] The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N. A. A. C. P. v. Button*, 371 U.S. 415, 429. [*270] [HN13] The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-376, gave the principle its classic formulation:

"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, [*721]hope and imagination; that fear breeds repression; that repression [***701]breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

[***HR12] [***HR13] Thus we consider this case against the background of a profound national commitment to the principle that [HN14] debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago*, 337 U.S. 1, 4; *De Jonge v. Oregon*, 299 U.S. 353, 365. [*271] The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

[***HR14] [HN15] Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall*, 357 U.S. 513, 525-526. [HN16] The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P. v. Button*, 371 U.S. 415, 445. As Madison said, " [HN17] Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* (1876), p. 571. In *Cantwell v. Connecticut*, 310 U.S. 296, 310, the Court declared:

" [HN18] In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

[HN19] That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression [*272] are to have the "breathing space" that they "need . . . to survive," *N. A. A. C. P. v. Button*, 371 U.S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson*, 76 U.S. App. D. C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper [***702] article charging him with anti-Semitism in opposing a judicial appointment. He said:

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant [*722] or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . [HN20] Whatever is added to the field of libel is taken from the field of free debate." n13

-----Footnotes-----

n13 See also Mill, *On Liberty* (Oxford: Blackwell, 1947), at 47:

" . . . To argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

-----End Footnotes-----

[***HR15] [HN21] Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and [*273] reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U.S. 252. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U.S. 367; *Wood v. Georgia*, 370 U.S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, supra, 331 U.S., at 376, surely the same must be true of other government officials, such as elected city commissioners. n14 Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

-----Footnotes-----

n14 The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875 (1949).

For a similar description written 60 years earlier, see Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346 (1889).

-----End Footnotes-----

[***HR16] [HN22] If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 et seq.; Smith, *Freedom's Fetters* (1956), at 426, 431, [***703] and passim. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious [*274] writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were [**723] to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

"doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto -- a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, supra, pp. 553-554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is [*275] it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" Id., pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . ." 4 Elliot's Debates, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government. n15

-----Footnotes-----

n15 The Report on the Virginia Resolutions further stated:

"It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 Elliot's Debates, supra, p. 575.

-----End Footnotes-----

[*276] Although [***704] the Sedition Act was never tested in this Court, n16 the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e. g., Act of July 4, 1840, c. 45, 6 [*724] Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-289; Douglas, *The Right of the People* (1958), p. 47. See also Cooley, *Constitutional Limitations* (8th ed., Carrington, 1927), pp. 899-900;

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

Chafee, *Free Speech in the United States* (1942), pp. 27-28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

-----Footnotes-----

n16 The Act expired by its terms in 1801.

-----End Footnotes-----

[***HR17] There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. [HN23] It is true that the First Amendment was originally addressed only to action by the Federal Government, and [*277] that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States*, 341 U.S. 494, 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, e. g., *Gitlow v. New York*, 268 U.S. 652, 666; *Schneider v. State*, 308 U.S. 147, 160; *Bridges v. California*, 314 U.S. 252, 268; *Edwards v. South Carolina*, 372 U.S. 229, 235.

[***705]

[***HR18] [HN24] What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. n17 The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N. E. 86, 90 (1923). [HN25] Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case -- without the need for any proof of actual pecuniary loss -- was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. [*278] And since [HN26] there is no double-jeopardy limitation applicable to civil [*725] lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. n18 Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70.

-----Footnotes-----

n17 Cf. *Farmers Union v. WDAY*, 360 U.S. 525, 535.

n18 The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another \$500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total \$2,000,000.

-----End Footnotes-----

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

[***HR19] The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

"For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [His] timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word [***706] which the State could not constitutionally [*279] suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 U.S. 147, 153-154.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. n19 Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e. g., *Post Publishing Co. v. Hallam*, 59 F. 530, 540 (C. A. 6th Cir. 1893); see also Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, supra, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is [**726] inconsistent with the First and Fourteenth Amendments.

-----Footnotes-----

n19 [HN27] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitica*, in *Prose Works* (Yale, 1959), Vol. II, at 561.

-----End Footnotes-----

[***HR20] [HN28] The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made [*280] with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts, n20 is found in the [***707] Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

"where an article is published and circulated among voters for the sole purpose of giving what the defendant [*281] believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P., at 286):

" [HN29] It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The [**727] public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged."

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

"In such a case the occasion gives rise to a privilege, qualified to this extent: [HN30] any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of [*282] public concern, public men, and candidates for office." 78 Kan., at 723, 98 P., at 285.

-----Footnotes-----

n20 E. g., *Ponder v. Cobb*, 257 N. C. 281, 299, 126 S.E.2d 67, 80 (1962); *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959); *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 65-67, 340 P.2d 396, 400-401 (1959); *Bailey v. Charleston Mail Assn.*, 126 W. Va. 292, 307, 27 S.E.2d 837, 844 (1943); *Salinger v. Cowles*, 195 Iowa 873, 889, 191 N. W. 167, 174 (1922); *Snively v. Record Publishing Co.*, 185 Cal. 565, 571-576, 198 P. 1 (1921); *McLean v. Merriman*, 42 S. D. 394, 175 N. W. 878 (1920). Applying the same rule to candidates for public office, see, e. g., *Phoenix Newspapers v. Choisser*, 82 Ariz. 271, 276-277, 312 P. 2d 150, 154 (1957); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 230, 203 N. W. 974, 975 (1925). And see *Chagnon v. Union-Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961), cert. denied, 369 U.S. 830.

The consensus of scholarly opinion apparently favors the rule that is here adopted. E. g., 1 Harper and James, *Torts*, § 5.26, at 449-450 (1956); Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 891-895, 897, 903 (1949); Hallen, *Fair Comment*, 8 Tex. L. Rev. 41, 61 (1929); Smith, *Charges Against Candidates*, 18 Mich. L. Rev. 1, 115 (1919); Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346, 367-371 (1889); Cooley, *Constitutional Limitations* (7th ed., Lane, 1903), at 604, 616-628. But see, e. g., American Law Institute, *Restatement of Torts*, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041 (2) (1936)); Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 413, 419 (1910).

-----End Footnotes-----

Such a privilege for criticism of official conduct n21 is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. n22 But all hold that all officials are protected unless actual malice [***708] can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, supra, 360 U.S., at 571. Analogous

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California*, 274 U.S. 357, 375 (concurring opinion of Mr. Justice Brandeis), quoted *supra*, p. 270. As Madison said, see *supra*, p. 275, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct [*283] did not have a fair equivalent of the immunity granted to the officials themselves.

-----Footnotes-----

n21 The privilege immunizing honest misstatements of fact is often referred to as a "conditional" privilege to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, e. g., Prosser, *Torts* (2d ed., 1955), § 95.

n22 See 1 Harper and James, *Torts*, § 5.23, at 429-430 (1956); Prosser, *Torts* (2d ed., 1955), at 612-613; American Law Institute, *Restatement of Torts* (1938), § 591.

-----End Footnotes-----

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

[***HR21] [***HR22] [***HR23] We hold today that [HN31] the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, n23 the rule requiring proof of actual malice is applicable. While [**728] Alabama law apparently requires proof of actual malice for an award of punitive damages, n24 where general damages are concerned malice is "presumed." Such a presumption is inconsistent [*284] with the [***709] federal rule. " [HN32] The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey v. Alabama*, 219 U.S. 219, 239; "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff . . ." *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959). n25 Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg v. California*, 283 U.S. 359, 367-368; *Williams v. North Carolina*, 317 U.S. 287, 291-292; see *Yates v. United States*, 354 U.S. 298, 311-312; *Cramer v. United States*, 325 U.S. 1, 36, n. 45.

-----Footnotes-----

n23 We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

n24 *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960). Thus, the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel."

The court refused, however, to give the following instruction which had been requested by the Times:

"I charge you . . . that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, . . . and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant . . . was motivated by personal ill will, that is actual intent to do the plaintiff harm, or that the defendant . . . was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights."

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

n25 *Accord, Coleman v. MacLennan*, supra, 78 Kan., at 741, 98 P., at 292; *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 510, 275 P.2d 663, 668 (1954).

-----End Footnotes-----

[**HR24] [**HR25] [**HR26] Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine [*285] whether it could constitutionally support a judgment for respondent. [HN33] This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of [**729] the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335; see also *One, Inc., v. Olesen*, 355 U.S. 371; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372. We must "make an independent examination of the whole record," *Edwards v. South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. n26

[**HR27] [**HR28] [**HR29]

-----Footnotes-----

n26 The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "[HN34] no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 242-243; cf. *The Justices v. Murray*, 9 Wall. 274. [HN35] But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "This Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-386. See also *Haynes v. Washington*, 373 U.S. 503, 515-516.

-----End Footnotes-----

[**HR30] Applying [**710] these standards, we consider that the proof presented to show actual malice lacks the convincing [*286] clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

[**HR31] [**HR32] As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" -- although respondent's own proofs tend to show that it was -- that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point -- a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the [*287] necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the [**730] explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

[**HR33] Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for [**711] actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; n27 their failure to reject it on this ground was not unreasonable. We think [*288] the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 618, 116 A.2d 440, 446 (1955); *Phoenix Newspapers, Inc., v. Choisser*, 82 Ariz. 271, 277-278, 312 P.2d 150, 154-155 (1957).

-----Footnotes-----

n27 The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and . . . may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

-----End Footnotes-----

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

[***HR34] We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

"The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor . . . ; a real estate and insurance man . . . ; the sales manager of a men's clothing store . . . ; a food equipment man . . . ; a service station operator . . . ; and the operator of a truck line for whom respondent had formerly worked Each of these witnesses stated that he associated the statements with respondent" (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements -- the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him -- did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts [*289] in question. The statements upon which respondent [**731] principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama [***712] State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. n28 This reliance on the bare [*290] [***713] fact of respondent's [**732] official position n29 was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that the libelous [*291] matter was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

"We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala., at 674-675, 144 So.2d, at 39.

-----Footnotes-----

n28 Respondent's own testimony was that "as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it [a statement] is associated with me when it describes police activities." He thought that "by virtue of being Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "It is my feeling that it reflects not only on me but on the other Commissioners and the community."

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

Grover C. Hall testified that to him the third paragraph of the advertisement called to mind "the City government -- the Commissioners," and that "now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary." It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position." "I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that -- arrest folks for speeding and loitering and such as that." Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it." In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual."

William M. Parker, Jr., testified that he associated the statements in the two paragraphs with "the Commissioners of the City of Montgomery," and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truck-loads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."

n29 Compare *Ponder v. Cobb*, 257 N. C. 281, 126 S.E.2d 67 (1962).

-----End Footnotes-----

[***HR35] [***HR38] This proposition has disquieting implications for criticism of governmental conduct. For good reason, " [HN36] no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N. E. 86, 88 [*292] (1923). The present proposition would sidestep this obstacle by transmuted criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. n30 We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other [***714]

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

[***HR36] [***HR37]

-----Footnotes-----

n30 Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. [HN37] Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

-----End Footnotes-----

The [**733] judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[***715] [APPENDIX] [***716]

[SEE ILLUSTRATION IN ORIGINAL.]

CONCURBY: BLACK; GOLDBERG

CONCUR: [*293] MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Ante, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail [*294] to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar [***717] verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been [**734] awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which [*295] might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press -- now that it has been shown to be possible -- is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction -- by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr v. Matteo*, 360 U.S. 564. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States. n1 This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United [*296] States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since. n2 Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798, n3 which made it a crime -- "seditious libel" -- to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, ante, pp. 273-276, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of [***718] the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

-----Footnotes-----

n1 See cases collected in *Speiser v. Randall*, 357 U.S. 513, 530 (concurring opinion).

n2 See, e. g., 1 Tucker, *Blackstone's Commentaries* (1803), 297-299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

n3 Act of July 14, 1798, 1 Stat. 596.

-----End Footnotes-----

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***, 1964 U.S. LEXIS 1655

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth*[**735] v. United States, 354 U.S. 476, and "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, are not expression within the protection of the First Amendment, n4 freedom to discuss public affairs and public officials [*297] is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." n5 An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. n6

-----Footnotes-----

n4 But see *Smith v. California*, 361 U.S. 147, 155 (concurring opinion); *Roth v. United States*, 354 U.S. 476, 508 (dissenting opinion).

n5 1 Tucker, *Blackstone's Commentaries* (1803), 297 (editor's appendix); cf. Brant, *Seditious Libel: Myth and Reality*, 39 N. Y. U. L. Rev. 1.

n6 Cf. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

-----End Footnotes-----

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with [*298] 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Ante, at 279-280. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history n1 and precedent marshaled by the Court, [***719] however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

-----Footnotes-----

n1 I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, "has carried the day in the court of history," ante, at 276, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were "false, scandalous and malicious."

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

(Emphasis added.) For prosecutions under the Sedition Act charging malice, see, e. g., Trial of Matthew Lyon (1798), in Wharton, *State Trials of the United States* (1849), p. 333; Trial of Thomas Cooper (1800), in id., at 659; Trial of Anthony Haswell (1800), in id., at 684; Trial of James Thompson Callender (1800), in id., at 688.

-----End Footnotes-----

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's [*736] mind, " cf. *Bridges v. California*, 314 U.S. 252, 270, about public officials and affairs needs "breathing space to survive," *N. A. A. C. P. v. Button*, 371 U.S. 415, 433. The right should not depend upon a probing by the jury of the motivationⁿ² of the citizen or press. The theory [*299] of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

-----Footnotes-----

ⁿ² The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in *United States v. Ballard*, 322 U.S. 78, 92-93, is relevant here: "As a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen." See note 4, *infra*.

-----End Footnotes-----

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N. E. 86, 88. I fully agree. Government, however, is not an abstraction; it is made up of individuals -- of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.ⁿ³ As the [***720] Court notes, although there have been [*300] "statements of this Court to the effect that the Constitution does not protect libelous publications . . . none of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." *Ante*, at 268. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no [*737] conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. *Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 530. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms [*301] in the area

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

of race relations. The American Colonists were not willing, nor should we be, to take the risk that "men who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. *Sweeney v. Patterson*, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458.

-----Footnotes-----

n3 It was not until *Gitlow v. New York*, 268 U.S. 652, decided in 1925, that it was intimated that the freedom of speech guaranteed by the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See *Whitney v. California*, 274 U.S. 357; *Fiske v. Kansas*, 274 U.S. 380. In 1931 Chief Justice Hughes speaking for the Court in *Stromberg v. California*, 283 U.S. 359, 368, declared: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

-----End Footnotes-----

Our national experience teaches that repressions breed hate and "that hate menaces stable government." *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

"Imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if [***721] desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not [*302] abridge the freedom of public speech or any other freedom protected by the First Amendment. n4 This, of course, cannot be said "where [**738] public officials are concerned or where public matters are involved. . . . One main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." Douglas, *The Right of the People* (1958), p. 41.

-----Footnotes-----

n4 In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, *supra*.

-----End Footnotes-----

376 U.S. 254, *, 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e. g., *Barr v. Matteo*, 360 U.S. 564; *City of Chicago v. Tribune Co.*, 307 Ill., at 610, 139 N. E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the [*303] case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In [***722] this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Gregoire v. Biddle*, 177 F.2d 579, 581.

[*304] If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, *Barr v. Matteo*, supra, at 571, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will [**739] be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important." n5 If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct. n6

-----Footnotes-----

n5 MR. JUSTICE BLACK concurring in *Barr v. Matteo*, 360 U.S. 564, 577, observed that: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

n6 See notes 2, 4, supra.

-----End Footnotes-----

376 U.S. 254, *; 84 S. Ct. 710, **;
11 L. Ed. 2d 686, ***; 1964 U.S. LEXIS 1655

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . ." Wood v. Georgia, 370 U.S. 375, 389. The public [*305] official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses [***723] and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Cantwell v. Connecticut, 310 U.S. 296, 310. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants." n7

-----Footnotes-----

n7 See Freund, The Supreme Court of the United States (1949), p. 61.

-----End Footnotes-----

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

REFERENCES:

The Supreme Court and the right of free speech and press

Annotation References:

1. The Supreme Court and the right of free speech and press. 93 L ed 1151, 2 L ed 2d 1706.
2. Libel and slander: actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public employee. 53 ALR2d 8.
3. Doctrine of privilege or fair comment as applicable to misstatements of fact in publication relating to public officer or candidate for office. 110 ALR 412, 150 ALR 358.
4. Constitutionality of statutes or ordinances making one fact presumptive evidence of another. 51 ALR 1139, 86 ALR 179, 162 ALR 495.
5. Retraction as affecting right of action or amount of damages for libel or slander. 13 ALR 794.
6. Sufficiency of identification of plaintiff by publication or statement complained of as libelous or slanderous. 91 ALR 1161.
7. Libel and slander: publication or statement as defamatory, by reason of extrinsic facts, of person not referred to nor intended to be referred to. 69 ALR 734.
8. What evidence is admissible to identify plaintiff as person defamed. 95 ALR 2d 227.

James Edmond Page, Jr., and Susan Nichols Page, Appellants, v. Carolina Coach Company, Appellee
No. 81-1041

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

667 F.2d 1156; 1982 U.S. App. LEXIS 22885; 115 L.R.R.M.4128; 107 Lab. Cas. (CCH) P55,829

November 2, 1981, Argued
January 4, 1982, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: In a breach of an oral contract action, appellant employee and spouse sought review of a decision from the United States District Court for the District of Maryland, at Baltimore, which granted a directed verdict in favor of appellee employer.

OVERVIEW: Appellant employee was a driver for appellant employer and protected by union collective bargaining. He then became a dispatcher, which was a management position not covered by collective bargaining. The union renegotiated the collective bargaining agreement and the "bump back" clause, which would have protected appellant in the case of demotion, was not included. Appellant was later terminated. He filed an oral breach of contract action against appellee and argued that he had given up his union position and union protection because he relied upon inducements made by appellee. The trial court rendered a directed verdict in favor of appellee and appellant sought review. The court affirmed. It found that appellant's relinquishment of his union position to accept the management position was insufficient as a matter of law to provide consideration for a lifetime employment contract or to establish contract by estoppel.

OUTCOME: The court affirmed the directed verdict granted in favor of appellee employer because appellant employee failed to establish the formation of a lifetime employment contract.

CORE TERMS: dispatcher, lifetime, driver, bump, terminal, collective bargaining agreement, employment contract, relinquishment, relinquish, job security, intoxicated, terminated, discharged, inducements, full-time, seniority, mutually, regular, induced, expired, started, losing

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

Contracts Law: Types of Contracts: Employment Contracts

[HN1] Under Maryland law, an employment contract of indefinite duration is an employment at will which can be terminated without cause by either party. A contract for lifetime employment can be created if the employee gives valuable consideration in addition to the services incident to the employment. However, the mere relinquishment of a job, business or profession by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract, and is not consideration for a contract of life employment.

667 F.2d 1156, *; 1982 U.S. App. LEXIS 22885, **;
115 L.R.R.M. 4128; 107 Lab. Cas. (CCH) P55,829

COUNSEL: Michael P. May, Baltimore, Md. (Patrick A. O'Doherty, Gordon C. Murray, Baltimore, Md., on brief), for appellants.

Warren M. Davison, Baltimore, Md. (Earle K. Shawe, Patrick M. Pilachowski, Shawe & Rosenthal, Baltimore, Md., on brief), for appellee.

JUDGES: Before HALL, PHILLIPS and CHAPMAN, Circuit Judges.

OPINIONBY: PER CURIAM:

OPINION: [*1156]

James Page and his wife sued the Carolina Coach Company for breaching an alleged oral contract to employ Page for his lifetime. The district court directed a verdict in favor of the Company, and Page appeals. We affirm, although for reasons other than those relied upon by the district court.

Page started working for the Company in 1961 as a bus driver. In 1971, Page let it be known that he was interested in becoming a dispatcher. The dispatcher's position was [*1157] generally considered more desirable than that of driver because dispatchers worked regular hours, were not away from home overnight, and were entitled to better benefits. However, the drivers were represented by the Amalgamated[**2] Transit Union and were subject to a collective bargaining agreement which provided that a driver could be discharged only for just cause. Because dispatchers were part of management, they were not protected by a union contract. In Page's case this disadvantage was somewhat mitigated by a clause in the Transit Union contract which permitted drivers who became dispatchers to "bump back" to driver at any time without losing either seniority or benefits.

Page was asked by the chief dispatcher if he would like to work as a part-time dispatcher while retaining his full-time job as a driver. Page accepted, and started dispatching on weekends and his days off. In October, 1971, he relinquished his driver position to become a full-time dispatcher at the Company's State Road, Delaware, terminal. Shortly after this change, Ralph Heres, the Vice-President of Operations, told Page that he had made "a wise move."

The drivers' collective bargaining agreement was scheduled to expire in November, 1973. In early 1972, rumors began to circulate that the bump back clause would be eliminated when the current contract expired. To protect his seniority and job security, Page bumped back to driver in[**3] February, 1972. Nevertheless, in October, 1972, he again became a dispatcher. Although he was still fearful of losing his bump back rights, Page stated that he was induced to make the change by a Company supervisor. The "inducements" cited by Page were: (1) the regular work hours of the dispatcher position; (2) being home at night; and (3) the dispatcher's better benefits. As noted earlier, these inducements were simply characteristics of the dispatcher position.

In the spring of 1973, Page and his wife met with Heres. Page requested a transfer to Salisbury, Maryland, which Heres granted. Page's wife, however, was more concerned with her husband's job security and benefits. Heres told them that he considered Page to be a good employee with potential who would move up in the Company if he continued to do his job. Neither Page nor his wife could remember Heres stating a specific period of time during which Page could expect to be employed. Following the meeting, Page transferred to Salisbury and assumed his post as a dispatcher.

The drivers' collective bargaining agreement expired in November, 1973, and a new contract was negotiated and signed on April 1, 1973. As had been[**4] rumored, the bump back clause was deleted, but former drivers who had bump back rights under the old contract were given until May 16, 1974, to exercise those rights. After May 16, the rights would automatically terminate.

Page discussed this option with his wife, but not with any representative of the Company. Page decided to remain a dispatcher, and sent a letter informing Heres of his decision.

667 F.2d 1156, *; 1982 U.S. App. LEXIS 22885, **;
115 L.R.R.M. 4128; 107 Lab. Cas. (CCH) P55,829

Page continued to work as a dispatcher at the Salisbury terminal until June 30, 1974, when he suffered a heart attack. For the next two months, he convalesced at home and received disability benefits. On the evening of August 30, 1974, Page drank an ounce of bourbon as directed by his doctor. At about 8:30 p.m., Page called the terminal to find out how the new dispatcher was handling the heavy Labor Day traffic. The dispatcher said that things were hectic, so Page went to the terminal to see if he could be of assistance. Page's condition apparently led other employees to believe that he was intoxicated, and as a result, he was subsequently discharged for having been on Company property while intoxicated.

Page sued the Company on a multi-count complaint alleging both tort and contractual[**5] theories of recovery. The district court entered summary judgment for the Company on all counts except an alleged breach of a lifetime employment contract. At trial, Page attempted to prove that Heres had promised him lifetime employment if he would become a dispatcher, and had induced him to leave his position as driver, [*1158] thereby forfeiting his union benefits and protection. The jury was unable to reach a verdict, so a mistrial was declared. The court then reconsidered the evidence and the lifetime contract theory and directed a verdict in favor of the Company. The court reasoned that the purported contract lacked mutuality of obligation because Page was not obligated to work for the Company. Further, the court concluded that the Company was not estopped from denying the contract's existence because Heres' statements could not reasonably be interpreted as a promise of lifetime employment. On appeal, Page challenges these conclusions.

The Company does not contend that Page's discharge was justified by his alleged intoxicification, but rather that Page was an employee at will who could be terminated at any time without cause. Page argues that Heres' statements and [**6] his reliance on them created a contract of lifetime employment. Thus, the focal point of this appeal is the nature of Page's employment relationship with the Company.

[HN1] Under Maryland law, an employment contract of indefinite duration is an employment at will which can be terminated without cause by either party. *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). A contract for lifetime employment can be created if the employee gives valuable consideration in addition to the services incident to the employment. See *C & P Telephone Co. v. Murray*, 198 Md. 526, 84 A.2d 870 (1951). For example, such a contract is created when an employee relinquishes a personal injury claim against his employer in exchange for the employer's promise of a lifetime job. *Pullman Co. v. Ray*, 201 Md. 268, 94 A.2d 266 (1952). However, the mere relinquishment of a "job, business or profession by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract, and is not consideration for a contract of life employment." *C & P Telephone Co.*, 198 Md. at 533, 84 A.2d at 873.[**7]

The foregoing authorities do not state whether the parties to a lifetime contract must mutually bind themselves to lifetime employment. In accordance with the majority of authorities, Page and the Company agree that the employee need not promise to work for the employer for a lifetime. n1 Therefore, the district court erred in ruling that the absence of mutually binding obligations precluded the existence of the contract.

-----Footnotes-----

n1. See, e.g., *F. S. Royster Guano Co. v. Hall*, 68 F.2d 533 (4th Cir. 1934). See generally, 3A A. Corbin, *Contracts* § 684 (1960), and cases collected at 58 A.L.R. 1312, 1315 (1929).

-----End Footnotes-----

Nevertheless, the evidence clearly shows that Page did nothing more than relinquish his job and benefits as a driver to assume the new position as dispatcher. This relinquishment is insufficient as a matter of law to provide consideration for a lifetime contract. Further, we agree with the district court that Heres' statements could not reasonably be interpreted as a promise of lifetime[**8] employment, but rather only as words of encouragement. Accordingly, Page has not established a factual basis for either a lifetime employment contract or contract by estoppel.

With the modifications noted herein, the district court judgment is affirmed.

AFFIRMED.

CHERYL A. PETERS, Plaintiff-Appellant, v. TIMOTHY JENNEY, Individually and in his official capacity as Superintendent of Schools; K. EDWIN BROWN, Individually and in his official capacity as Assistant Superintendent for Accountability; NANCY GUY, Individually and in her official capacity as a School Board Member; SHEILA MAGULA, Individually and in her official capacity as Associate Superintendent for Curriculum and Instruction; SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH, VIRGINIA, Defendants-Appellees. UNITED STATES OF AMERICA, Amicus Supporting Appellant.
No. 01-2413

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2003 U.S. App. LEXIS 7540

June 4, 2002, Argued
April 22, 2003, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Tommy E. Miller, Magistrate Judge. (CA-01-120-2).

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff gifted education director sued defendant school officials and board for not renewing her contract alleging retaliation claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq.; 42 U.S.C.S. § 1983; and the First Amendment. By consent, the U.S. District Court for the Eastern District of Virginia, at Norfolk referred the case to a magistrate judge who granted summary judgment to defendants. The director appealed.

OVERVIEW: The director, who was a Caucasian, was hired to head a gifted program that had been accused of discriminating against black students. The director argued that her contract was not renewed because of her advocacy of increasing minority participation in the program. Defendants argued that her contract was not renewed based on her poor performance. The court held that an agency quite reasonably could construe § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, to forbid purposeful retaliation based upon opposition to practices made unlawful by § 601. However, the director had not been given a chance to prove that she reasonably believed the school district was engaged in intentional discrimination. On the First Amendment claim, the court held that a reasonable finder of fact could conclude that the director's advocacy of various policy changes to the gifted program was the but-for cause of the nonrenewal of her contract.

OUTCOME: The judgment was vacated and remanded.

CORE TERMS: retaliation, gifted, intentional discrimination, regulation, right of action, summary judgment, cause of action, enforceable, disparate impact, forbid, advocacy, school district, school board, opposing, teacher, nonrenewal, retaliated, subjected, color, entry of summary judgment, privilege secured, national origin, adverse action, interfering, quotation, enacting, vacate, coach, recommended, equitable

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Summary Judgment: Standards of Review

[HN1] Appellate courts review the entry of summary judgment de novo.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN2] Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the evidence of the nonmoving party is to be believed and all justifiable inferences must be drawn in its favor. A mere scintilla of proof, however, will not suffice to prevent summary judgment; the question is not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party resisting summary judgment. A failure to produce evidence sufficient to permit a jury to find for the nonmovant plaintiff as to one of the elements of his cause of action renders all other issues of fact immaterial.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN3] See 42 U.S.C.S. § 2000d.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN4] See 42 U.S.C.S. § 2000d-1.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN5] See 34 C.F.R. § 100.7(e).

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN6] The Department of Education's regulations concerning Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., which establish rights under "this part" for purposes of 34 C.F.R. § 100.7(e), forbid intentional discrimination, as well as practices that have a disparate impact, but are not intentionally discriminatory. 34 C.F.R. § 100.3. The regulations further require affirmative action to overcome the effects of prior discrimination, 34 C.F.R. § 100.3(b)(6)(i), and permit affirmative action even in the absence of such prior discrimination, 34 C.F.R. § 100.3(b)(6)(ii).

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Enforcement

[HN7] It is well-settled that there is an implied private right of action to enforce the core prohibition of discrimination of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, in federally financed programs. It is equally clear that § 601 prohibits only intentional discrimination, not "disparate impact" practices.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Enforcement

[HN8] The United States Supreme Court has held that assumedly valid § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d-1, regulations that forbid disparate impact practices are not enforceable via an implied private right of action. On the other hand, the Court has held that regulations applying the ban on intentional discrimination of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, if valid and reasonable under the standard of *Chevron USA, Inc. v. Natural Resources Defense Council* are enforceable in a private action.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN9] Under the familiar *Chevron* standard, when it appears that Congress delegated authority to an agency generally to make rules carrying the force of law, courts give great deference to an administrative implementation of the particular statutory provision. In applying the *Chevron* standard, courts inquire first whether the intent of Congress is clear as to the precise question at issue. If so, that is the end of the matter. If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN10] An administrative regulation cannot create an enforceable 42 U.S.C.S. § 1983 interest not already implicit in the enforcing statute.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN11] An agency quite reasonably could construe § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, to forbid purposeful retaliation based upon opposition to practices made unlawful by § 601.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

[HN12] 34 C.F.R. § 100.7(e) expressly addresses intimidatory, coercive, or discriminatory conduct engaged in for the purpose of interfering with any right or privilege secured by § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d. The regulation thus targets retaliatory action actually intended to bring about a violation of § 601's core prohibition on intentional racial discrimination. Retaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Coverage

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Enforcement

[HN13] Congress, in enacting § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, did not forbid unintentional disparate impact practices but merely forbade intentional discrimination. Only the prohibition of intentional discrimination, as validly construed by regulations, is enforceable via a private right of action. It cannot be that a valid interpretation of § 601 protects opposition to practices that are clearly outside § 601's ambit. Stated another way, § 601's implicit prohibition on retaliation is congruent with and limited by, § 601's basic prohibition on intentional discrimination. Thus, the retaliation regulations are enforceable via an implied private right of action to the extent that they forbid retaliation for opposing practices that one reasonably believes are made unlawful by § 601. Insofar as they forbid retaliation for opposing disparate impact practices not actionable under § 601, the regulations may not be enforced either via the § 601 private right of action or 42 U.S.C.S. § 1983.

Governments: Courts: Authority to Adjudicate

[HN14] When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

Civil Procedure: Summary Judgment: Standards of Review

[HN15] While appellate courts may affirm summary judgment on alternate grounds and may articulate the law governing a claim properly before them in a manner different from that urged by the parties, they will not ordinarily affirm summary judgment on grounds raised by an appellee for the first time on appeal, where the parties were not afforded an opportunity to develop the issue below so that the party was not on notice of the need to meet it. Fairness demands that a party be given an appropriate opportunity to present evidence on each aspect of her claim before suffering an adverse entry of summary judgment.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Enforcement

[HN16] To make a claim for retaliation pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., a plaintiff must show (1) that she engaged in protected activity; (2) that the defendants took a material adverse action against her, and (3) that a causal connection existed between the protected activity and the adverse action. Retaliation may be proved either via direct evidence or the burden shifting scheme of *McDonnell Douglas Corp. v. Green*. The difference, however, between direct evidence and *McDonnell Douglas* proof in the retaliation context pertains to the third, causal connection, prong of a retaliation claim, which may be proved circumstantially in the *McDonnell Douglas* context. As in other civil rights contexts, to show protected activity, the plaintiff in a Title VI retaliation case need only prove that she opposed an unlawful employment practice which he reasonably believed had occurred or was occurring. Oppositional activities are not protected unless they are proportionate and reasonable under the circumstances; courts must balance the purpose of protecting opposition to discrimination against Congress's manifest desire not to tie the hands of employers in the objective selection and control of personnel.

Constitutional Law: Civil Rights Enforcement: Federally Assisted Programs: Enforcement

[HN17] While proof of a disparate impact, in combination with other circumstantial and direct evidence of intent, can sometimes support an inference of intentional discrimination, a jury issue on intentional discrimination is not created ipso facto by pointing to a policy's disparate effects. A facially neutral policy does not violate Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., solely because of its disproportionate effects. Indeed, to prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decisionmaker adopted the policy at issue "because of," not merely "in spite of," its adverse effects upon an identifiable group. Deliberate indifference to a policy's disparate impacts, as opposed to the purposeful pursuit of those impacts, is not a viable theory under Title VI.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN18] To prevail on a First Amendment retaliation claim, a public employee must show (1) that she engaged in protected expression regarding a matter of public concern; (2) that her interest in First Amendment expression outweighed her employer's interest in efficient operation of the workplace; (3) that she was deprived of some valuable benefit; and (4) that a causal relationship exists between her protected expression on matters of public concern and the loss of the benefit. The "causal relationship" inquiry focuses on whether the deprivation would have taken place "but for" her protected speech" and involves two steps. In the first step, the employee bears the burden of establishing the requisite causation to prove that the protected speech was a motivating factor or played a substantial role in inducing the adverse action. If the employee is able to prove such, the second step shifts the burden to the employer to put forward evidence that it would have taken adverse action even in the absence of the protected speech.

COUNSEL: ARGUED: Kristen M. Galles, EQUITY LEGAL, Alexandria, Virginia, for Appellant.

Seth Michael Galanter, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

Richard Hoyt Matthews, PENDER & COWARD, P.C., Virginia Beach, Virginia, for Appellees.

ON BRIEF: Deborah C. Waters, RUTTER, WALSH, MILLS & RUTTER, L.L.P., Norfolk, Virginia, for Appellant.

Ralph F. Boyd, Jr., Assistant Attorney General, Dennis J. Dimsey, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

Paul A. Driscoll, PENDER & COWARD, P.C., Virginia Beach, Virginia, for Appellees.

JUDGES: Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

OPINIONBY: WILLIAMS

OPINION:

WILLIAMS, Circuit Judge:

Dr. Cheryl Peters appeals from the district court's n1 grant of summary judgment rejecting her retaliation claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1994), 42 U.S.C.A. § 1983 (West 1994) [*2], and the First Amendment to the U.S. Constitution against the Virginia Beach School Board (the School Board or Board) and various individuals associated with the Virginia Beach School District. n2 Because we conclude that Title VI provides a cause of action for retaliation based upon opposition to practices that Title VI forbids, we vacate the district court's grant of summary judgment and remand to provide the parties with an opportunity to further develop the record regarding the nature of the practices that Peters opposed as well as to address other relevant issues. Because we conclude that Peters adequately pleaded a First Amendment retaliation claim and presented evidence sufficient to survive summary judgment as to the requisite causal relationship between her advocacy of changes to the gifted program and the nonrenewal of her contract, we vacate the district court's entry of summary judgment on Peters's First Amendment claim.

-----Footnotes-----

n1 By consent of the parties, the district court referred this case to a magistrate judge to conduct all proceedings pursuant to Federal Rule of Civil Procedure 73 and 28 U.S.C.A. § 636 (West 1993 & Supp. 2001).
[*3]

n2 Appellee Virginia Beach School Board is the statutory controlling body for the Virginia Beach School District. Appellee Timothy Jenney is the district's Superintendent of Schools. Appellee K. Edwin Brown is the assistant superintendent for accountability. Appellee Sheila Magula is the associate superintendent for curriculum and instruction. Appellee Nancy Guy is an individual member of the Board. All appellees collectively will be referred to as "Appellees."

-----End Footnotes-----

I.

A.

Peters, who is Caucasian, is a specialist in gifted education and holds a doctorate in that field. She was hired in 1997 by the school board as the Director of Gifted Education and Magnet Programs. At the time she was hired, there were three African-Americans on the Board. Peters was recruited from the Rockfield, Illinois public schools, where she worked to effect compliance with a desegregation order, and she also advised other school districts on a consulting basis regarding Title VI compliance issues.

When Peters was hired, Virginia Beach Superintendent of Schools Timothy Jenney was aware that the Office of Civil Rights of[*4] the U.S. Department of Education (OCR) was considering a discrimination complaint filed by Curtis W. Harris, the President of the Virginia chapter of the Southern Christian Leadership Conference (SCLC). The complaint alleged that the school district had violated Title VI of the Civil Rights Act of 1964 by (1) failing to place black students in gifted programs on a proportionate basis; (2) failing to hire and promote black teachers and administrators on a proportionate basis; (3) "inappropriately" transferring black teachers and administrators; (4) discriminatorily assigning students to classes and/or ability groups; and (5) disciplining black students on a disproportionate basis. n3 Jenney was aware that Peters was experienced in complying with the requests of the OCR, but Peters was not aware of the SCLC complaint at the time she was hired.

-----Footnotes-----

n3 Importantly, each of these charges was framed in disparate impact terms, focusing on the "proportionality" of representation along various dimensions rather than any intentionally discriminatory practice.

-----End Footnotes-----

[*5]

Within a few weeks after Peters was hired by the school district, Jenney called her to his office to discuss the complaint pending before the OCR and the need to "get OCR off [the school district's] back." (J.A. at 259.) Peters was directed to talk to the OCR, attempt to satisfy it, write an action plan to respond to its concerns, and successfully "handle" the concerns of parents regarding any changes to the gifted program caused by the school district's OCR concerns. (J.A. at 259.) Peters told the OCR that she perceived a "willingness, indeed commitment" on the part of the school district's administration to "provide equitable opportunities for all students." (J.A. at 121.) She developed an eight-point "Action Plan" for the gifted program (the Plan), which in relevant part called for increased efforts to retain minority students in the program, better training of staff and teachers to recognize giftedness, expansion of recruitment efforts directed towards minority students, and enhanced efforts to inform parents and students about the program and about the "characteristics of giftedness." (J.A. at 495.) Jenney and the Board approved the Plan, and Peters asserts that the OCR "accepted" [*6] the Plan. (Appellant's Br. at 6.) In 2001, the OCR commended Jenney for "evidencing a strong commitment to ensuring equal access to gifted education and promoting educational excellence and opportunity for all students." (J.A. at 180.)

Peters also developed an in-depth program model which partially was focused on improving minority participation in the program. One major element of this plan involved converting a gifted elementary school, known as the Old Donation Center (ODC), from operation on a one-day-a-week basis, with gifted students attending their home schools the other four days per week, to a full-time, five-days-a-week gifted school. Further, the plan called for the establishment of a gifted resource program in each school for students who were not admitted to ODC. Peters also promoted blanket testing of all first and third grade students, which she asserts was to be conducted in a manner that would make the identification process more "inclusionary." n4 (J.A. at 264.)

-----Footnotes-----

n4 Some evidence indicates that the Virginia Beach gifted program identifies as gifted a less than proportionate number of black students. (J.A. at 303, 305.) Some evidence further indicates that, when the "gifted" status of students is evaluated using achievement test scores, the percentage of gifted black students in the overall student population is greater than the percentage of black students in the gifted program. (J.A. at 305.) Thus, some evidence indicates that the selection procedures employed by the school district's gifted program under-identified black students as eligible for the gifted program.

-----End Footnotes-----

[*7]

In March of 1998, the School Board approved Peters's program model. Her relations with the school district's administration deteriorated, however, after her supervisor, Michael O'Hara, was replaced by Sheila Magula, who allegedly told Peters that she was opposed to Peters's program model. During a July 16, 1998, meeting, Magula complained to Peters of numerous performance inadequacies, ranging from nonresponsiveness to media inquiries to missed deadlines, a failure to return important telephone calls, and a failure to select the best applicants for positions at ODC and as gifted resource teachers in schools other than ODC. On September 1, 1998, Magula reprimanded Peters for missing work without an approved absence and recommended that she be docked one day's pay. According to Peters, the absence in question occurred because she needed to obtain medical treatment. On October 26, 1998, Jenney reprimanded Peters for failing to meet deadlines, failing to adhere to accepted employment practices in hiring teachers, and engaging in various alleged incidents of unprofessional conduct involving missed meetings, a lack of understanding of budgeting processes, and nonresponsiveness to various[*8] of Jenney's inquiries. Jenney also stated that "there is a tremendous amount of evidence that circumstantially links [Peters] with a great deal of . . . unrest in the gifted and talented community." n5 (J.A. at 49.)

-----Footnotes-----

n5 Peters asserts that Jenney asked her to cease meeting with groups of minority parents, as she was "stirring them up and causing problems." (J.A. at 269.) Neither party, however, provides specific information regarding the nature of any statements she made which allegedly "stirred up" parents. Peters alleges that during one meeting with parents in January 1999, minority parents told her that when they asked Jenney what programs were available for their children, he referred to the school lunch program.

-----End Footnotes-----

Sometime in November of 1998, Jenney recommended that Peters be suspended from her position. After opposition developed among some parents, Jenney gave Peters a "second chance," but he placed her under the supervision of defendant K. Edwin Brown, the Assistant Superintendent for Accountability. [*9] Jenney asserts that he took this step because of his concerns that personality conflicts with Magula might be responsible for Peters's difficulties. On February 17, 1999, after supervising Peters for approximately ten weeks, Brown concluded that she had failed to improve her performance and recommended that Jenney terminate her immediately. Brown stated that he recommended terminating Peters because "she was incapable of leading the gifted program in a responsible, responsive manner." n6 (J.A. at 45.) Jenney initially concurred in Brown's recommendation but withdrew his dismissal recommendation to the School Board prior to commencing a public hearing on the dismissal. Instead, Jenney decided to pursue nonrenewal of Peters's contract. Jenney avers that he was dissatisfied with Peters's performance because she missed meetings, failed to communicate with appropriate persons in the school district, inadequately planned and implemented changes to the gifted program, and caused divisions and controversy in the program. Forty out of fifty-three of the principals surveyed by Brown several months prior to the non-renewal of Peters's contract felt that "the gifted program lacks focus or direction" [*10] and that "there are serious issues which interfere with the effectiveness of the gifted resource program in their schools." (J.A. at 51.)

-----Footnotes-----

n6 Peters alleges that Brown told her that he had initially opposed her appointment because he was concerned that she would be too "militant about minority issues" based upon her background, which Brown felt displayed no understanding of local culture. (J.A. at 220.)

-----End Footnotes-----

In March of 1999, the School Board, on a 10-1 vote, declined to renew Peters's probationary contract. The one dissenting member of the Board favored terminating Peters immediately rather than simply declining to renew her contract. It is undisputed that minority enrollment in the gifted program increased each year after Peters's departure.

Peters claims that, in the sequence of events leading to the nonrenewal of her contract, the defendants thoroughly undermined her effectiveness in a manner "designed to sabotage" her "efforts to implement an equitable program for all children in Virginia Beach." (J.A. at 222.) [*11] Peters asserts generally that the school district was plagued by "numerous areas of discrimination" and "serious equity problems," which were deemed "appropriate for the Virginia Beach culture" by Appellees. (J.A. at 258-59.) She states that she viewed her job as "correcting horrendous discrimination" by "consciously [running] every . . . aspect of the [gifted] program through an equity filter" in order to "proactively support[] the needs and rights of minority children." (J.A. at 260-61.) She claims that defendant Brown had "maintained programming and an identification process that favored children from white, affluent, influential families and excluded minority children." (J.A. at 263.)

B.

Following the nonrenewal of her contract, Peters filed this action on February 16, 2001, claiming that Jenney, as well as others connected with the school district, violated her rights under Title VI, discharged her in retaliation for the exercise of her First Amendment rights in violation of § 1983, and defamed her under Virginia common law. Appellees filed a motion for summary judgment on October 9, 2001. Peters filed an opposition on October 27, 2001. Appellees filed a rebuttal limited[*12] to the issue of Peters's defamation claim on or about October 26, 2001. The district court held a hearing on October 30, 2001, after which it granted Appellees' summary judgment motion in full. n7 Peters timely appealed and challenges only the district court's dismissal of her Title VI and First Amendment retaliation claims.

-----Footnotes-----

n7 The district court's reasoning for its decision was not embodied in a written opinion but was simply stated from the bench.

-----End Footnotes-----

II.

[HN1] We review the entry of summary judgment in favor of Appellees de novo. *American Legion Post 7 v. City of Durham*, 239 F.3d 601, 605 (4th Cir. 2001). [HN2] Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . ." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In deciding whether there is a genuine [*13] issue of material fact, "the evidence of the nonmoving party is to be believed and all justifiable inferences must be drawn in its favor." *Durham*, 239 F.3d at 605. A mere scintilla of proof, however, will not suffice to prevent summary judgment; the question is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party" resisting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (internal quotation marks omitted). A failure to produce evidence sufficient to permit a jury to find for the nonmovant plaintiff as to one of the elements of his cause of action renders all other issues of fact immaterial. *Celotex*, 477 U.S. at 323.

A.

The district court granted summary judgment for Appellees as to Peters's Title VI retaliation claims on the ground that after *Alexander v. Sandoval*, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001), no private cause of action exists for retaliation either under Title VI or its implementing regulations. We will proceed by stating the relevant[*14] statutory and regulatory provisions and will then analyze the impact of *Sandoval* on the availability of a cause of action for Title VI retaliation.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

[HN3] No person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d.

Section 602 of the Act provides that:

[HN4] Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability

42 U.S.C.A. § 2000d-1.

The Department of Education has promulgated a regulation, 34 C.F.R. Part 100, which provides:

[HN5] (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, [*15] or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

34 C.F.R. § 100.7(e) (second emphasis added).

[HN6] The Department of Education's Title VI regulations, which establish rights under "this part" for purposes of 34 C.F.R. § 100.7(e), forbid intentional discrimination, as well as practices that have a disparate impact, but are not intentionally discriminatory. 34 C.F.R. § 100.3. The regulations further require "affirmative action to overcome the effects of prior discrimination," 34 C.F.R. § 100.3(b)(6)(i), and permit affirmative action "even in the absence of such prior discrimination," 34 C.F.R. § 100.3(b)(6)(ii).

B.

[HN7] It is well-settled that there is an implied private right of action to enforce § 601's core prohibition of discrimination in federally financed programs. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-611, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983);[*16] cf. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979) (addressing Title IX, and suggesting that a private right of action exists with respect to Title VI). It is equally clear that § 601 prohibits only intentional discrimination, not "disparate impact" practices. *Alexander v. Sandoval*, 532 U.S. 275, 280, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001); cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (§ 601 "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment") (opinion of Powell, J.).

In *Sandoval*, [HN8] the Court addressed the question of whether assumedly valid § 602 regulations that forbid disparate impact practices are enforceable via an implied private right of action. *Sandoval*, 532 U.S. at 282. The Court held that they are not, because Congress must authorize causes of action; "agencies may play the sorcerer's apprentice," specifying to some degree the content of rights conferred by statute, but may not act as "the sorcerer himself," creating causes of action not established[*17] by Congress. *Id.* 438 U.S. at 291. On the other hand, the

Sandoval Court held that "regulations applying § 601's ban on intentional discrimination," if valid and reasonable under the standard of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), are enforceable in a private action. *Sandoval*, 532 U.S. at 284. The Court elaborated:

We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, see *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative[*18] interpretation of the statute to be so enforced as well.

Sandoval, 532 U.S. at 284.

-----Footnotes-----

n8 The Supreme Court has assumed without deciding that a regulation could be valid under § 602 (as a "means of effectuating" Title VI) without being a valid interpretation of § 601, which prohibits only intentional discrimination. *Sandoval*, 532 U.S. at 282.

-----End Footnotes-----

[HN9] Under the familiar *Chevron* standard, "when it appears that Congress delegated authority to an agency generally to make rules carrying the force of law, we give great deference to an administrative implementation of the particular statutory provision." *McDaniels v. United States*, 300 F.3d 407, 411 (4th Cir. 2002) (internal quotation marks and alterations omitted). In applying the *Chevron* standard, "we inquire first whether the intent of Congress is clear as to the precise question at issue If so, that is the end of the matter." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 130 L. Ed. 2d 740, 115 S. Ct. 810 (1995)[*19] (internal quotation marks and citations omitted). If, however,

the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

Id. (internal quotation marks and citations omitted).

To determine whether there is a private cause of action for retaliation under Title VI, we must resolve the question of whether 34 C.F.R. § 100.7(e)'s retaliation prohibition is an interpretation of § 601's core antidiscrimination mandate. If § 100.7(e) is an interpretation of § 601 that is valid under *Chevron*, it commands deference and may be enforced via an implied private right of action. If instead, § 100.7(e) is a regulation which, even if valid as a § 602 "means of effectuating" Title VI, nonetheless "forbid[s] conduct that § 601 permits," *Sandoval*, 532 U.S. at 285, namely conduct other than intentional discrimination,[*20] the regulation may not be enforced via an implied private right of action. n9

-----Footnotes-----

n9 To the extent that Peters cannot show an implied right of action to enforce the retaliation regulations, § 1983 does not provide Peters with a cause of action. [HN10] "An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987). Relying partially on *Smith*, the Third Circuit has recently rejected the claim that disparate impact regulations promulgated under

§ 602 of Title VI are enforceable via § 1983. *South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001) (stating that disparate impact regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983" (internal citation omitted)); see also *Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324, 1327 (11th Cir. 2001) (holding that regulations which, even if valid, impose new and distinct obligations not found in the statute itself, are not enforceable via § 1983).

-----End Footnotes-----

[*21]

C.

Appellees argue that § 601 does not forbid retaliation and that the prohibition on retaliation therefore arises solely from agency regulations that are, after *Sandoval*, unenforceable via an implied private right of action. In support of this proposition, Appellees cite *Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203 (4th Cir. 1994), in which we held that 34 C.F.R. § 100.7(e) prohibits retaliation. *Id.* at 206 n.2. Reliance on *Preston* is, however, misplaced; it does not follow from our observation that § 100.7(e) prohibits retaliation that this prohibition is unenforceable in a private action. Section 100.7(e) is enforceable in a private action if it is a "regulation[] applying § 601's ban on intentional discrimination," *Sandoval*, 532 U.S. at 284, and nothing in *Preston* suggests that it is not such a regulation.

Further, the failure of § 601 to include a specific prohibition on retaliation apart from its general prohibition of racial discrimination cannot, in light of relevant precedent interpreting similarly worded antidiscrimination statutes, lead to an inference[*22] that Congress did not mean to prohibit retaliation in § 601, or that those who oppose intentional discrimination violative of § 601 are not within the class for whose benefit Congress enacted that provision. In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 24 L. Ed. 2d 386, 90 S. Ct. 400 (1969), the Supreme Court, interpreting 42 U.S.C.A. § 1982's grant to all citizens of the same rights to transact in property "as is enjoyed by white citizens," held that a white man who was expelled from a neighborhood board for attempting to sell property to a black man could maintain an action under § 1982. *Id.* at 236. Section 1982, like § 601 of Title VI, contains no explicit retaliation provision. The *Sullivan* Court noted that the white plaintiff was expelled "for the advocacy of [a black man's] cause If that sanction, backed by a state court judgment, can be imposed, then [the plaintiff] is punished for trying to vindicate the rights of minorities protected by § 1982 There can be no question but that [the plaintiff]" may maintain an action under § 1982. *Id.* *Sullivan* thus stands for the proposition[*23] that a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination. Additionally, we have held that retaliation is a viable theory under 42 U.S.C.A. § 1981, which, similarly to § 601 of Title VI, prohibits only intentional discrimination and makes no separate reference to retaliation. See *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980); see also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (holding, based on *Sullivan*, that retaliation is a viable theory under § 1981).

Our good colleague's dissent argues that, under the approach to analyzing implied private rights of action embodied in *Cannon v. University of Chicago*, 441 U.S. 677, 688, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), *Peters's* claim fails because she is not a member of the class for whose benefit Congress enacted § 601. *Post*, at 23-24. Thus, the dissent argues, even if § 601 contains an implicit retaliation prohibition, no private right of action is available to *Peters*. The difficulty[*24] with this argument is that both *Sullivan* and *Fiedler* expressly held, not only that the analogous language of §§ 1981 and 1982 forbids retaliation for opposing the practices that those provisions prohibit, but also that a private right of action is available to those who engage in protected opposition under §§ 1981 and 1982. See *Sullivan*, 396 U.S. at 237 (holding that "there can be no question" that a white plaintiff subjected to adverse action for attempting to sell property to a black man may "maintain this action" under § 1982); *Fiedler*, 631 F.2d at 1149 (white student plaintiffs injured because of association with black students have statutory standing to sue under § 1981). The dissent's precise mode of reasoning would mandate a different result in both cases, effectively disturbing settled precedent.

Moreover, the *Sullivan* line of authority has found broad and continuing acceptance, in this court and others, long after *Cannon* was decided. See *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 258 (4th Cir. 2001) (following *Fiedler* ; holding that a white motel customer evicted due to association with black customers[*25] may maintain a private action under § 1981); *Johnson*, 215 F.3d 561, 576 (6th Cir. 2000) (white plaintiff allegedly retaliated against for opposing discrimination may bring suit under § 1981); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266-67 (10th Cir. 1989) (plaintiff, a white attorney, who was allegedly subjected to adverse action because of his representation of black clients, may maintain action under § 1981 if he can show that he was deprived of an interest protected by § 1981); *Skinner v.*

Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988) (white employee allegedly terminated for assisting a black employee could maintain an action under § 1981).

Section 1981, like § 601, "only proscribes purposeful discrimination." Murrell, 262 F.2d at 257. Neither § 601, nor §§ 1981 or 1982, contains an explicit retaliation provision. Yet, as a matter of substance, a matter of standing, and a matter of the availability of a private right of action, myriad courts, before and after Cannon, have held that the general prohibitions on intentional discrimination embodied in §§ 1981 and 1982 extend to provide [*26] a cause of action to those who can demonstrate that they have been purposefully injured due to their opposition to intentional racial discrimination. The question thus reduces to whether we can reverse, under Chevron's deferential mandate, an agency construction that is materially identical to the approach taken over a period of decades by the Supreme Court, this court, and numerous other courts, without the benefit of Chevron deference, in construing provisions that are indistinguishable from § 601 in relevant respects. In particular, an examination of this court's decisions in Fiedler and Murrell convinces us that maintaining the coherence and analytical consistency of our precedent requires that we answer this question in the negative. n10

-----Footnotes-----

n10 We note that the Eleventh Circuit's opinion in Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002), did not consider the impact of Sullivan and its progeny on the question that we decide today.

-----End Footnotes-----

In light of [*27] the lengthy line of authority discussed above, we conclude that [HN11] an agency quite reasonably could construe § 601 to forbid purposeful retaliation based upon opposition to practices made unlawful by § 601. For example, an agency could reason that such retaliation serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it. Clearly, a practice such as expelling any student who speaks against an officially sanctioned and explicit exclusion of a particular racial group from a school program, or terminating a teacher who refuses to give lower grades to some students on the basis of race, would violate § 601 on a Chevron-permissible construction of that provision. Further, it is neither inconsistent with the text of § 601 nor an unreasonable construction of that section for an agency to construe it to cover those who are purposefully injured for opposing the intentional discrimination Congress made unlawful via § 601. In this connection, we note that the regulation in question [HN12] expressly addresses intimidatory, coercive, or discriminatory conduct engaged [*28] in "for the purpose of interfering with any right or privilege secured by Section 601" of Title VI. 34 C.F.R. § 100.7(e) (emphasis added). The regulation thus targets retaliatory action actually intended to bring about a violation of § 601's core prohibition on intentional racial discrimination. Retaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either. Thus, Appellees' contention that no retaliation of any kind is prohibited by Title VI is untenable. To accept such a contention, we would have to reverse under the Chevron standard an agency construction of § 601 that is, in effect, the same one developed by the Supreme Court in Sullivan in construing the similar provisions of § 1982 and embraced by this and other courts in construing § 1981. This we cannot do.

D.

Having determined that 34 C.F.R. § 100.7(e)'s retaliation prohibition is, at least to some extent, a valid interpretation of § 601 that is enforceable via § 601's implied private [*29] right of action, the question remains of the scope and contours of any privately enforceable retaliation prohibition. The answer must turn on which portion of § 100.7(e) one examines. The regulation's prohibition on retaliation "for the purpose of interfering with any right or privilege secured by section 601 of the Act" is, for the reasons we have discussed above, a valid interpretation of § 601 and is enforceable via an implied private right of action. 34 C.F.R. § 100.7(e) (emphasis added). On the other hand, the regulation's prohibition on retaliation "for the purpose of interfering with any right or privilege secured by . . . this part" encompasses every right or privilege created by Part 100. Id. (emphasis added). Part 100 rights include the right to be free of unintentional disparate impact practices. It is clear after Sandoval that [HN13] Congress, in enacting § 601, did not forbid unintentional disparate impact practices but merely forbade intentional discrimination. Only the prohibition of

intentional discrimination, as validly construed by regulations, is enforceable via a private right of action. It cannot be that a valid interpretation[*30] of § 601 protects opposition to practices that are clearly outside § 601's ambit. Thus, the correct inquiry is whether the practices which Peters opposed constituted intentional discrimination forbidden by § 601. n11 Stated another way, § 601's implicit prohibition on retaliation is congruent with and limited by, § 601's basic prohibition on intentional discrimination. Thus, the retaliation regulations are enforceable via an implied private right of action to the extent that they forbid retaliation for opposing practices that one reasonably believes n12 are made unlawful by § 601. n13 Insofar as they forbid retaliation for opposing disparate impact practices not actionable under § 601, the regulations may not be enforced either via the § 601 private right of action or § 1983.

-----Footnotes-----

n11 Peters contends that retaliation is inherently intentional in nature, that all retaliation is intentional discrimination, and thus, that Sandoval is of no moment in this case. We note, however, that "retaliation" exists conceptually only by reference to the acts which form the basis for it. Terminating an employee because she opposes practices which have nothing to do with Title VI is not Title VI retaliation. See 34 C.F.R. § 100.7(e) ("No recipient . . . shall . . . discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act" (emphasis added)).

[*31]

n12 See pp. 18-19 *infra* for our discussion of the reasonable belief standard.

n13 Our conclusion in this respect accords with the position urged by the United States as *amicus curiae*, whose participation in this appeal has been helpful to the court. The United States limited its argument to the availability of a retaliation cause of action under Title VI and expressed no opinion regarding the availability of a cause of action via § 1983 or regarding Peters's First Amendment claims.

-----End Footnotes-----

E.

Before the district court, Appellees argued only one ground -- the total unavailability of a cause of action for Title VI retaliation -- in support of summary judgment as to Peters's Title VI retaliation claim. The district court did not address (and Appellees did not ask it to address) whether Peters succeeded in creating a genuine issue of fact as to whether she reasonably believed the school district to be engaged in intentional discrimination that would violate Title VI. n14

-----Footnotes-----

n14 This state of affairs does not impair our ability to articulate the law governing Title VI retaliation claims; [HN14] "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Servs.*, 500 U.S. 90, 99, 114 L. Ed. 2d 152, 111 S. Ct. 1711 (1991). Thus, given that the issue of the availability of a private right of action for Title VI retaliation is properly before us, we have the authority to determine the contours of any cause of action that is available. See *Forshey v. Principi*, 284 F.3d 1335, 1357 (Fed. Cir. 2002) (en banc) (applying the *Kamen* framework, and stating by way of example that if one party argues that a beyond a reasonable doubt standard of proof is applicable to an issue and the other party argues that a preponderance of the evidence standard is applicable, the Court of Appeals may hold that an (intermediate) clear and convincing evidence standard applies).

-----End Footnotes-----

[*32]

At oral argument, Appellees denied that the record in this case could support any inference that the practices opposed by Peters constituted intentional discrimination. If correct, this conclusion would be fatal to Peters's Title VI retaliation claim. [HN15] While we may affirm summary judgment on alternate grounds and may articulate the law governing a claim properly before us in a manner different from that urged by the parties, we will not ordinarily affirm summary judgment on grounds raised by an appellee for the first time on appeal, "where the parties were not afforded an opportunity to develop the issue below . . . so that the party was not on notice of the need to meet it . . ." *FDIC v. Lee*, 130 F.3d 1139, 1142 (5th Cir. 1997). Fairness demands that a party be given an appropriate opportunity to present evidence on each aspect of her claim before suffering an adverse entry of summary judgment. Thus, because it is possible that Peters can develop additional evidence supporting the conclusion that she reasonably believed the school district to have been engaged in intentional discrimination, we will remand for such additional discovery as may be warranted.

In order[*33] to assist the district court on remand, we will briefly review the elements of a Title VI retaliation claim. [HN16] To make a claim for Title VI retaliation, Peters must show (1) that she engaged in protected activity; (2) that Appellees took a material adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action. n15 *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), overruled on other grounds by *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (addressing Title VII retaliation). As in other civil rights contexts, to show "protected activity," the plaintiff in a Title VI retaliation case need "only . . . prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring." n16 *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir. 1990); see also *Ross*, 759 F.3d at 355 n.1 (stating that a Title VII oppositional retaliation claimant need not show that the underlying claim of discrimination was in fact meritorious in order to prevail). n17 The inquiry [*34] is therefore (1) whether Peters "subjectively (that is, in good faith) believed" that the district had engaged in a practice violative of § 601, and (2) whether this belief "was objectively reasonable in light of the facts," n18 a standard which we will refer to as one of "reasonable belief." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1312 (11th Cir. 2002).

-----Footnotes-----

n15 Retaliation may be proved either via direct evidence or the burdenshifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). The difference, however, between direct evidence and *McDonnell Douglas* proof in the retaliation context pertains to the third, causal connection, prong of a retaliation claim, which may be proved circumstantially in the *McDonnell Douglas* context. *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir. 1990).

n16 Oppositional activities are not protected unless they are proportionate and reasonable under the circumstances; courts must balance the purpose of protecting opposition to discrimination against Congress's "manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (addressing Title VII retaliation) (internal citation omitted). [*35]

n17 In contrast to Title VI, the Fourteenth Amendment's Equal Protection Clause, and the equal protection component of the Fifth Amendment, Title VII prohibits practices that are not intentionally discriminatory but that have a disparate impact on members of a particular racial group. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) (stating that, under Title VII, the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

n18 [HN17] While proof of a disparate impact, in combination with other "circumstantial and direct evidence of intent," *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977), can sometimes support an inference of intentional discrimination, a jury issue on intentional discrimination is not created ipso facto by pointing to a policy's disparate effects. *Gen. Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S.

375, 396, 73 L. Ed. 2d 835, 102 S. Ct. 3141 (1982) (stating that "it would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof of disparate impact"); see also *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 487, 137 L. Ed. 2d 730, 117 S. Ct. 1491 (1997) (noting that the impact of an official action is sometimes probative, along with other evidence, of the intent behind the action). A facially neutral policy "does not violate [Title VI] solely because of its disproportionate effects." *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002) (quoting *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996)). Indeed, "to prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decisionmaker . . . adopted the policy at issue 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)). Deliberate indifference to a policy's disparate impacts, as opposed to the purposeful pursuit of those impacts, is not a viable theory under Title VI. *Id.* 288 F.3d at 567.

-----End Footnotes-----

[*36]

III.

The district court also granted summary judgment to Appellees on Peters's First Amendment retaliation claim, which she pleaded as an assertion that Appellees "retaliated against her because of her advocacy for a racially equitable gifted program" in violation of 42 U.S.C.A. § 1983 and the Fourteenth Amendment. (J.A. at 12.) The district court held that Peters's complaint made no reference to the First Amendment and thus did not properly plead a First Amendment claim, and that even if the issue had been properly pleaded, Peters did not create a genuine issue of fact regarding the causal link between any protected expression and adverse employment action.

At the outset, it is clear that the First Amendment claim was properly pleaded. See *McKinley v. Kaplan*, 177 F.3d 1253, 1257 (11th Cir. 1999) (noting that no heightened requirements of pleading particularity apply to First Amendment claims brought via 42 U.S.C.A. § 1983). Peters alleged in her complaint that she was terminated because of her advocacy of changes to the gifted program, in violation of the Fourteenth Amendment. To the extent that this method of pleading[*37] created ambiguity as between a procedural due process or equal protection claim and a First Amendment claim, the facts alleged as the basis for the claim would make it clear that the claim arose under the First Amendment as incorporated by the Fourteenth Amendment. See *Krieger v. Fadely*, 341 U.S. App. D.C. 163, 211 F.3d 134, 137 (D.C. Cir. 2000) (noting that complaints need not "plead law or match facts to every element of a legal theory" (internal quotation marks omitted)). In this connection, we note that Appellees fully addressed the First Amendment claim on the merits in their summary judgment submissions. While less than crystalline, Peters's brief in opposition to summary judgment characterized her claim as involving a violation of the right "to be free from unlawful discrimination as guaranteed by the First and Fourteenth Amendments." (J.A. at 252). At oral argument on Appellees' summary judgment motion, Peters characterized her claim as "in the nature of a free speech argument." (J.A. at 1217). The district court then asked Peters why she didn't "brief the free speech issue then, or at least make it clearer than you did." (J.A. at 1217). Peters's counsel responded[*38] that a basis for Peters's claim in Count Two was that "the First Amendment gives her the right to speak out against illegal discrimination." (J.A. at 1217-1218). After an additional colloquy, the district court asked Peters's counsel to elaborate further on "your First Amendment claim . . . what's the causal relationship between her deprivation of her First Amendment rights and the benefit that she lost?" (J.A. at 1227-28). Peters's counsel responded that "she has the right under the First Amendment to advocate for racial equity in the program . . . and so the causal connection is that because of her advocacy of nondiscrimination. . . they nonrenewed her." (J.A. at 1228). And, as we have noted, the district court ruled on the merits of Peters's First Amendment claim. (J.A. at 1243.)

In short, then, Peters fully, if inartfully, pleaded the factual predicate for her First Amendment claim; Appellees addressed it as such in their summary judgment submissions; Peters characterized her claim as arising under the First Amendment in responding to those submissions; the merits of the First Amendment claim were rather extensively explored at oral argument on summary judgment; and the district[*39] court ruled on the First Amendment claim on the merits. Accordingly, both Appellees and the district court were on adequate notice of Peters's First Amendment claim, and we do not believe that she waived such a claim. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 997-98, 152 L. Ed. 2d 1 (2002) (noting that under the notice pleading regime embodied in Fed. R. Civ. P. 8(a)(2), highly technical requirements of pleading specificity are disfavored); *Conley v. Gibson*, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (stating that courts must "reject the approach that pleading is a game of skill in which one mis-step

by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

[HN18] To prevail on her First Amendment retaliation claim, Peters must show (1) that she engaged in protected expression regarding a matter of public concern; (2) that her interest in First Amendment expression outweighs her employer's interest in efficient operation of the workplace; (3) that she was deprived of some valuable benefit; and (4) that a causal relationship exists between her protected expression[*40] on matters of public concern and the loss of the benefit. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 351-52 (4th Cir. 2000); *Huang v. Board of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990). The "causal relationship" inquiry focuses on whether Peters's contract would have been renewed "but for" her protected speech" and "involves two steps In the first step, the employee bears the burden of establishing the requisite causation to prove that the protected speech was a motivating factor or played a substantial role" in inducing the adverse action. *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 193 (4th Cir. 1994). "If the employee is able to prove such, the second step shifts the burden to the employer to put forward evidence that it would have [taken adverse action] even in the absence of the protected speech." *Id.*

Appellees do not challenge on appeal Peters's ability to satisfy the first three elements of a First Amendment retaliation claim. Instead, they contend only that Peters cannot show the necessary causal connection between any protected expression and the non-renewal of[*41] her contract. On this record, a reasonable finder of fact could conclude, however, that Peters's advocacy of various policy changes to the gifted program was the but-for cause of her termination. n19 For example, a reasonable finder of fact could credit Peters's allegations of extensive policy differences with her superiors in combination with Jenney's complaints to Peters, which were reiterated in the very letter by which Jenney recommended Peters's dismissal, that she was fomenting "unrest in the gifted community." (J.A. at 171.) Indeed, Peters's "inappropriate communications with parents, principals, teachers and media" were among Jenney's specifically enumerated reasons for recommending Peters's termination. (J.A. at 172.) Of course, evidence also abounds as to the possible performance-related reasons for the nonrenewal of Peters's contract, but a reasonable finder of fact could conclude, when confronted with this conflicting evidence, that whatever performance inadequacies might have been present, Peters ultimately was not offered a renewed contract because of her advocacy, within and outside the school district, of changes to the gifted program. Thus, the district court's grounds[*42] for entering summary judgment against Peters on her First Amendment retaliation claim are not viable. n20 Accordingly, we vacate the district court's grant of summary judgment in favor of Appellees on Peters's First Amendment retaliation claim.

-----Footnotes-----

n19 We note that a broader universe of advocacy is relevant to Peters's First Amendment retaliation claim than to her Title VI retaliation claim, because the category of speech on a matter of public concern is broader than the category of opposition to practices reasonably believed to be violative of Title VI.

n20 Appellees did not contend, in their motion for summary judgment below, that Peters is a "policymaker" under the rationale of *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), and *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980).

-----End Footnotes-----

IV.

The Department of Education has construed § 601 of Title VI to forbid retaliation, and to the extent that this prohibition has as its predicate [*43]opposition to practices forbidden by § 601, it is a reasonable interpretation of § 601 itself, which is enforceable via a private right of action. Nonetheless, a plaintiff bringing a Title VI retaliation claim must show that she believed, in good faith and with objective reasonableness, that she was opposing intentional discrimination of the sort that § 601 forbids. We therefore vacate the district court's entry of summary judgment dismissing Peters's Title VI retaliation claim and remand to allow the parties to address the nature of the practices which Peters opposed, as well as the other aspects of her claim. We vacate the district court's entry of summary judgment in favor of Appellees on

Peters's First Amendment retaliation claim because that claim was adequately pleaded and sufficient evidence existed to survive summary judgment regarding the necessary causal connection between Peters's advocacy and the nonrenewal of her contract, and remand for such additional proceedings as may be necessary on Peters's First Amendment claim.

VACATED AND REMANDED

DISSENTBY: WIDENER

DISSENT:

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. I do not believe that Title VI creates[*44] a private right of action for persons who are not direct victims of discrimination so I would affirm the district court's order granting summary judgment to defendants on plaintiff's Title VI claim. Furthermore, as I do not believe that plaintiff properly presented a First Amendment claim, I would affirm the district court's dismissal of count two of the complaint.

I.

For Dr. Peters to successfully prosecute a claim of retaliation under section 601 of Title VI, 42 U.S.C. § 2000d, the court must answer three questions in the affirmative: 1) Was plaintiff retaliated against for complaining of intentional discrimination, rather than disparate impact discrimination; 2) Are retaliation claims included within section 601's prohibition against intentional discrimination; and 3) Is plaintiff a member of the class of persons Congress sought to protect in enacting section 601? While I think insufficient the majority's reliance on an "implicit" prohibition to find a private right of action for retaliation under section 601, I note that it is not necessarily required to decide whether section 601 prohibits retaliation, for the judgment of the district court may be affirmed[*45] on the ground that Dr. Peters, as a person who was not a direct victim of discrimination, is not within the class of persons Congress sought to protect in enacting Title VI.

Sandoval directs that for a private right of action for retaliation to exist it must be found in a statute created by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001). While Title VI does not create any explicit private rights of action, *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 600, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), the Supreme Court has interpreted section 601 to prohibit intentional discrimination. See *Alexander v. Sandoval*, 532 U.S. 275, 280, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001) ("It is . . . beyond dispute . . . that § 601 prohibits only intentional discrimination."); *Alexander v. Choate*, 469 U.S. 287, 293, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) ("Title VI itself directly reaches only instances of intentional discrimination."). Although section 601's prohibition on intentional discrimination is enforceable through a private right of action, private rights of action[*46] are limited to the special class of persons Congress sought to benefit. *Cannon v. University of Chicago*, 441 U.S. 677, 688, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979) (stating "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person"); see also *Regional Mgmt. Corp v. Legal Servs. Corp.*, 186 F.3d 457, 463 (4th Cir. 1999). Thus, not only must plaintiff prove that section 601 prohibits retaliation, but she must also show that she is "one of the class for whose especial benefit" Title VI was enacted. *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916); see also *Gonzaga University v. Doe*, 536 U.S. 273, 153 L. Ed. 2d 309, 322, 122 S. Ct. 2268 (2002) (citing *Cannon* for the proposition that a statute is privately enforceable under implied right "only where Congress explicitly conferred a right directly on a class of persons that included the plaintiff in the case").

The court's duty is to "interpret the statute Congress has passed to determine whether it displays an intent to create not just[*47] a private right but also a private remedy" for this particular plaintiff. See *Sandoval*, 532 U.S. at 286. To determine whether a private right of action for Dr. Peters exists under Title VI, we should look to the language of the statute for "statutory intent is determinative." *Sandoval*, 532 U.S. at 286. Section 601 states "no person . . . shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a program receiving federal funding. 42 U.S.C. § 2000d. The plain language of section 601 is limited to those persons who have been "excluded for participating in, been denied the benefits of, or been subjected to discrimination" on the basis of race, color, or national origin by a federally funded program. 42 U.S.C. § 2000d. Dr. Peters--as a third party who alleges that she has complained about discrimination against others, but does not allege that she is a victim of discrimination--is not within the class of persons Congress sought to protect in enacting Title VI.

The Eleventh Circuit recently reached a similar[*48] conclusion in examining section 901 of Title IX, a statute containing language identical to section 601 of Title VI in describing the persons Congress sought to protect. See *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002); see also *Cannon*, 441 U.S. at 694-95. ("Title IX was patterned after Title VI . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class."). In *Jackson*, a high school coach of a girls' basketball team sued a local board of education alleging that the board retaliated against the coach by removing him from his coaching position after he complained of the school's different treatment of male and female athletic teams. *Jackson*, 309 F.3d at 1335. In determining that the high school coach did not have a private right of action for retaliation, the Eleventh Circuit concluded that "review of both the text and structure of Title IX yields no congressional intent to create a cause of action for retaliation, particularly for a plaintiff who is not a direct[*49] victim of gender discrimination." *Jackson*, 309 F.3d at 1348.

Had Congress intended to extend a private right of action under Title VI to persons other than victims of discrimination it knew how to do so. Title VII of the Civil Rights Act of 1964 contains an antiretaliation section expressly prohibiting an employer from retaliating against "any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). Unlike Title VII, Title VI contains no indication that Congress intended to protect persons who complained of, but were not the victims of, the discrimination prohibited by the statute. Quite simply, the language of section 601 only protects actual victims of race, color, and national origin discrimination. As I do not believe that plaintiff is among the class of persons Congress sought to protect in enacting Title VI, I would affirm the district court's judgment in favor of the defendants on the Title VI claim.

The Eleventh[*50] Circuit, in *Jackson*, alternately held that a private right of action for retaliation does not exist under Title IX based on *Sandoval*. See *Jackson*, 309 F.3d at 1344. Because this holding is a matter of statutory construction rather than a Constitutional question, such holding is entitled to equal dignity with the holding that the plaintiff, *Jackson*, was not within the class meant to be protected by Title IX. I depend on both aspects of *Jackson* for my disagreement with the majority. As *Sandoval* points out, 532 U.S. at 286 (quoting *Federal Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994)), a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]." Statutory intent is determinative in determining whether a private remedy exists. "Without it, a cause of action does not exist and the courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute . . . [citations omitted] 'Raising up causes of action where[*51] a statute has not created them may be a proper function for common law courts, but not for federal tribunals.'" *Sandoval*, 532 U.S. at 286-87.

As was the *Jackson* plaintiff, a coach of a girls' basketball team who complained about a school board which he alleged had discriminated under Title IX against girls' athletics, the plaintiff in this case, Dr. Peters, is at least twice removed from the class of people sought to be protected by the statute. Thus, there is no intent of Congress to protect her against retaliation, as there was no intent of Congress so to protect Coach *Jackson*.

Jackson was a Title IX case, while *Sandoval*, as is the case at hand, was a Title VI case. On the authority of *Cannon*, 441 U.S. at 694-95, the *Jackson* court read Titles VI and IX in *pari materia* as do I. See *Jackson*, 309 F.3d at 1339. On that account, the holding in *Jackson*, that there is no cause of action for retaliation, is, for all practical purposes, the holding of a sister circuit on the same question, contrary to the decision of the majority in this case.

II.

As to plaintiff's First Amendment claim, I cannot agree with the[*52] majority that plaintiff properly presented a first amendment claim because it is not the responsibility of the district court or this court to create a claim that counsel for plaintiff failed to spell out in her pleadings, briefs, or argument to the district court. See *Clark v. National Travelers Life Ins.*, 518 F.2d 1167 (6th Cir. 1975).

While the theory of notice pleadings directs that "counsel's failure to perceive the true basis of the claim" is not fatal at the pleading stage, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (2d ed. 1990), by the time a case reaches the summary judgment stage, the legal basis for plaintiff's claims should be reasonably apparent

in the briefs and arguments presented by counsel. See generally *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir. 1999) (noting that issues not briefed or argued on appeal are deemed abandoned). We review district court decisions "in light of what was, in fact, before it[.]" and should not permit, even in pro se cases, which this is not, "fleeting references to preserve questions on appeal" or require "district courts to anticipate[*53] all arguments that clever counsel may present in some appellate future." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Count two alleges that under 42 U.S.C. § 1983, defendants "violated the Constitutional rights of Peters when they retaliated against her for promoting a racially equitable gifted program." JA 8.* Count two is devoid of references to the First Amendment. The ambiguous language of count two creates a mystery as to what constitutional protection or protections plaintiff sought to invoke.

-----Footnotes-----*

Count Two

42 U.S.C. § 1983

(Against the School Board and Against the Individuals in both their

Official and Individual Capacities)

45. The Fourteenth Amendment to the United States Constitution requires that a state shall not "deny to any person within its jurisdiction the full protection of the laws."

46. 42 U.S.C. § 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

47. Under 42 U.S.C. § 1983, Defendants, acting under color of state law, may be held liable for their actions in violating the constitutional rights of Peters under the Fourteenth Amendment, namely by retaliating against her because of her advocacy for a racially equitable gifted program in the District.

48. The Defendants violated the Constitutional rights of Peters when they retaliated against her for promoting a racially equitable gifted program in the District.

-----End Footnotes-----

[*54]

Moreover, as the case progressed to the summary judgment stage, plaintiff failed to develop her argument to the court to clarify that she was asserting a first amendment claim. Instead, plaintiff's counsel continued to present vague and nonspecific arguments regarding the type of constitutional violation alleged. In fact, the record reveals that plaintiff's counsel on two separate occasions represented to the district court that she was asserting an equal protection claim in count two. See JA 253 (urging district court in response brief opposing summary judgment to "deny the Defendants' motion for summary judgment on the issue of § 1983 equal protection" (emphasis added)); JA 1216 (stating to district court during summary judgment hearing "I would like to move on to the second count . . . and that is the equal protection claim" (emphasis added)). In light of counsel for plaintiff's representations, I cannot agree with the majority's conclusion that if "this method of pleading created ambiguity as between a procedural due process or equal protection claim and a First Amendment claim, the facts alleged as the basis for the claim would make it clear that the claim arose under[*55] the First Amendment." Slip op. at 20. Neither is it relevant that the facts asserted in plaintiff's complaint would support a First Amendment claim where, as here, plaintiff failed to present the First Amendment argument to the district court. Cf. *Picard v. Connor*, 404 U.S. 270, 277, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971) (holding in the context

of exhaustion that even when petitioner presented all the facts supporting constitutional claim, it was error for a court of appeals to decide a constitutional theory not fairly presented to state court). Liberal pleading rules do not require a defendant or the court to hypothesize as to the constitutional protection a plaintiff seeks to vindicate when plaintiff continues to provide unresponsive and contradictory arguments.

Moreover, statements from both the district court and defense counsel should have alerted counsel for plaintiff of the need to clarify her pleadings and argument to the court. See generally JA 1217 (questioning by district court at summary judgment hearing regarding as to why plaintiff "did not brief the free speech issue"); JA 1240 (concluding that "pleadings by plaintiff create a bit of mystery to [the[*56] court] as to actually what they are seeking" in count two). Despite the expressed dissatisfaction of the district court, plaintiff did not move the district court, as she might have, to amend her complaint, but instead, now, in effect, seeks permission from this court to amend her complaint to add a First Amendment claim. The facts do not support effectively allowing plaintiff to move to amend for the first time on appeal. Accordingly, I would affirm the district court's decision that plaintiff failed to state a First Amendment claim.

Thomas J. Ross, Appellant, v. Communications Satellite Corporation, Appellee, Equal Employment Opportunity Commission, /A Amicus Curiae
No. 84-1355

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

759 F.2d 355; 1985 U.S. App. LEXIS 30421; 37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

December 3, 1984, Argued
April 12, 1985

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge. (C/A 82-575).

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee appealed a decision from the United States District Court for the District of Maryland, which granted summary judgment to defendant employer in an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

OVERVIEW: Plaintiff employee complained of sex discrimination by defendant employer, in violation of 42 U.S.C.S. § 2000e-2(a), and retaliatory harassment and discharge for filing discrimination charges with the Equal Employment Opportunity Commission, in violation of 42 U.S.C.S. § 2000e-3(a). The district court granted summary judgment to defendant, holding that plaintiff's retaliatory discharge claim was barred due to the collateral estoppel effect of a Maryland unemployment compensation proceeding which concluded that plaintiff had been discharged for misconduct. Plaintiff's remaining sex discrimination and retaliatory harassment claims were found meritless as well. Plaintiff appealed from the grant of summary judgment to defendant on his retaliatory discharge and harassment claims. The court reversed the district court decision, holding that, under controlling Maryland law, the Maryland unemployment compensation decision was not entitled to collateral estoppel effect in a Title VII action. The court remanded the case to the district court for reconsideration of the propriety of summary judgment under applicable Title VII standards.

OUTCOME: The court reversed the district court's grant of summary judgment to defendant employer, and remanded the case to the district court. The court directed the district court to determine whether all of the supporting evidence created a genuine factual question that "but for" plaintiff employee's filing of the charges with the Equal Employment Opportunity Commission, he would not have suffered harassment or dismissal.

CORE TERMS: summary judgment, retaliation, discharged, misconduct, harassment, collateral estoppel, preclusive effect, sex discrimination, claimant, adverse action, retaliatory, co-employee, retaliatory discharge, protected activity, motive, unemployment compensation, confidentiality, favorable, prima facie case, res judicata, termination, adjudicator, judicata, collateral estoppel effect, prospective employer, genuine issue, conversation, interfered, genuine, causal connection

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Discrimination: Retaliation

759 F.2d 355, *; 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

[HN1] An underlying discrimination charge need not be meritorious for a plaintiff to prevail on a claim of retaliation for opposition to the perceived discrimination.

Labor & Employment Law: Discrimination: Retaliation

[HN2] To disprove a legitimate nondiscriminatory explanation for adverse action offered by the employer under Title VII, a plaintiff must show that the alleged retaliation would not have occurred "but for" the protected conduct.

Civil Procedure: Preclusion & Effect of Judgments: Full Faith & Credit

[HN3] Under the "full faith and credit" mandate of 28 U.S.C.S. § 1738, the federal courts are required to give preclusive effect to state court judgments where the state courts themselves would do so.

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel

[HN4] Under Maryland law a judicial determination by one administrative agency is not binding on another adjudicator which is seeking to determine an apparently identical issue under a different statute, so long as there exist "substantial differences" between the statutes themselves.

Labor & Employment Law: Discrimination: Title VII

[HN5] Under Title VII, 42 U.S.C.S. § 2000e-3(a), it is an unlawful employment practice for an employer to discriminate against any employee because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Labor & Employment Law: Disability & Unemployment Insurance: Unemployment Compensation: Eligibility

[HN6] Md. Code Ann., art. 95A, § 6(c) requires that an individual be temporarily disqualified for unemployment benefits if discharged for misconduct connected with his work.

Civil Procedure: Summary Judgment: Burdens of Production & Proof

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN7] The burden is on defendant, as the party moving for summary judgment, to demonstrate the absence of any genuine issue of material fact. The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to plaintiff, as the party opposing the motion. Only where it is perfectly clear that there are no issues in the case is summary judgment proper, and even where a directed verdict would be proper after hearing the evidence, the district court should not try the case in advance by summary judgment. The nonmoving party is in a favorable posture, being entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered.

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN8] In determining whether summary judgment may be granted, the district court must perform a dual inquiry into the genuineness and materiality of any purported factual issues. Whether an issue is genuine calls for an examination of the entire record then before the court in the form of pleadings, depositions, answers to interrogatories, admissions on file and affidavits, under Fed. R. Civ. P. 56(c) and (e). Though the burden of proof rests initially with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the nonmoving party must produce specific facts showing that there is a genuine issue for trial, rather than resting upon the bald assertions of his pleadings. Rule 56(e). Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes.

Labor & Employment Law: Discrimination: Retaliation

Labor & Employment Law: Discrimination: Title VII

Labor & Employment Law: Discrimination: Disparate Treatment: Burden Shifting Analysis

Labor & Employment Law: Discrimination: Disparate Impact: Burden Shifting Analysis

[HN9] The sequence of proof and burdens prescribed by McDonnell Douglas Corp. are applicable to retaliation cases under 42 U.S.C.S. § 2000e-3 as well as to discriminatory treatment claims. The employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima facie case consists of three

759 F.2d 355, *; 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

elements: 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action. As in disparate treatment cases, the burden of establishing a prima facie retaliation case is not onerous. Once a prima facie case has been presented, the employer then has the burden of producing a legitimate nondiscriminatory reason for the adverse action, thereby rebutting the presumption of retaliation raised by the prima facie case. The employer is not required to prove the absence of a retaliatory motive, but only to raise a genuine issue of fact as to whether retaliation for protected activity occurred. Finally, if the employer produces a legitimate nondiscriminatory explanation, the employee bears the ultimate burden of proving retaliation by demonstrating that the employer's proffered reason is pretextual.

Labor & Employment Law: Discrimination: Retaliation

[HN10] For the employee to disprove a legitimate nondiscriminatory explanation for adverse action, he must show that the adverse action would not have occurred "but for" the protected conduct.

COUNSEL: Alan S. Gold (Narin & Chait; Steven P. Resnick; Martha F. Rasin; Bereano & Resnick on brief) for Appellant.

Anne McCully Murphy (Robert J. Smith; Sheryl J. Powers; Morgan, Lewis & Bockius on brief) for Appellees.

Peggy R. Mastroianni (David L. Slate, General Counsel; Philip B. Sklover, Associate General Counsel; Vincent Blackwood, Assistant General Counsel on brief), for Amicus Curiae.

JUDGES: Phillips and Wilkinson, Circuit Judges, and Butzner, Senior Circuit Judge.

OPINIONBY: WILKINSON

OPINION: [*356] WILKINSON, Circuit Judge:

This is an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982). Plaintiff Thomas J. Ross, employed by defendant Communications Satellite [*357] Corporation (hereinafter COMSAT) until his termination on August 24, 1981, complained of sex discrimination by defendant, 42 U.S. C. § 2000e-2(a), and retaliatory harassment and discharge for filing discrimination charges with the Equal Employment Opportunity[**2] Commission (EEOC), 42 U.S. C. § 2000e-3(a). Ross sought damages, reinstatement, attorney's fees and costs.

The district court granted summary judgment for COMSAT. It held that plaintiff's retaliatory discharge claim was barred due to the collateral estoppel effect of a Maryland unemployment compensation proceeding involving the same parties, which concluded that Ross had been discharged for misconduct. Plaintiff's remaining sex discrimination and retaliatory harassment claims were found meritless as well. Ross appeals from the grant of summary judgment to COMSAT on his retaliatory discharge and harassment claims. n1 We reverse.

-----Footnotes-----

n1 Ross does not appeal from the grant of summary judgment to COMSAT on his sex discrimination [HN1] An underlying discrimination charge need not be meritorious for a plaintiff to prevail on a claim of retaliation for opposition to the perceived discrimination. See e.g., *Pettaway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-05, 1007 (5th Cir. 1969); *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980), appeal dismissed sub nom. *Cassidy v. Virginia Carolina Veneer Corp.*, 652 F.2d 380 (4th Cir. 1981).

-----End Footnotes-----

[**3]

Under controlling Maryland law, ignored by the district court, the Maryland unemployment compensation decision was not entitled to receive collateral estoppel effect in a Title VII action alleging retaliatory discharge. Therefore, we remand to the district court for reconsideration of the propriety of summary judgment under the applicable Title VII

759 F.2d 355, *, 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

standards. Believing a clear explanation necessary of this Circuit's requirements for a plaintiff to prevail in a retaliation action under Title VII, we rule that [HN2] to disprove a legitimate nondiscriminatory explanation for adverse action offered by the employer, a plaintiff must show that the alleged retaliation would not have occurred "but for" the protected conduct.

I.

Ross, a single white male, was employed by COMSAT in its Research and Development Laboratories in Clarksburg, Maryland, from June 8, 1980 until his termination the next year. He held the position of Materials Engineer in the Materials and Process Department, and was under the supervision of Lawrence R. Sparrow, the department manager, who in turn reported to Dr. Edmund S. Rittner, Director of Physical Sciences.

Plaintiff's original sex discrimination claim, now no[**4] longer pressed, was that he experienced harassment, intimidation and unequal treatment following his rejection of purported sexual advances made by a female technician employed by COMSAT in another department of the Laboratories. Although supervisors attempted to resolve the conflict between them, Ross remained dissatisfied with the proposed work arrangements. In early February 1981, Ross threatened to file charges of professional misconduct and sexual harassment against the technician. Subsequently, in a meeting to discuss Ross's complaint, Rittner allegedly threatened Ross with discharge because of his attitude. On March 13, 1981, Ross filed his initial sex discrimination charge with the EEOC.

Following the filing of this charge, Ross contends that he experienced harassment by COMSAT superiors. Allegedly, his responsibilities and professional status were reduced, he was denied a performance review and annual salary and benefit increases, an article was printed in COMSAT's News Digest concerning his EEOC charge, and his supervisor Sparrow provided false information about his employment record to other prospective employers. Sparrow, according to Ross, also told one prospective[**5] employer, the Applied Physics Laboratory of Johns Hopkins University, that Ross had filed an EEOC charge. Ross's performance evaluations declined from generally favorable in December 1980 and March 1981 to unfavorable in June 1981, at least [*358] in part because of his relations with other employees and superiors. On July 8, 1981, Ross filed a retaliation charge with the EEOC.

There is evidence that Ross threatened to "get" Sparrow and Rittner following his unfavorable June performance evaluation, and that he spent substantial portions of his work day complaining to other employees about COMSAT's management and discussing his legal actions. About August 18, 1981, two other COMSAT employees spoke about Ross's EEOC charges with him. During the conversation Ross was asked what he would do if he lost his suit, and Ross responded that he might "blow the place up." The circumstances and seriousness of the threat are in dispute. The employees, however, reported the conversation, and on August 24, 1981, Rittner informed Ross that his employment was terminated because of unacceptable performance and intimidation of other employees. Ross then amended his second EEOC charge on August[**6] 26 to allege retaliatory discharge.

After his termination, Ross filed a claim for unemployment compensation with the Maryland Employment Security Administration (ESA). COMSAT contested his claim, and an ESA Claims Examiner found that Ross had been discharged for misconduct, and was therefore disqualified from receiving unemployment benefits for ten weeks, under Md. Code Ann. art. 95A, § 6(c) (1979). Ross appealed that decision, and a de novo hearing was held before an ESA Appeals Referee. The Referee concluded that the "claimant was discharged for misconduct connected with his work within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law," and affirmed the denial of benefits in a May 27, 1982 opinion. Most significant for this case, the Appeals Referee specifically determined in his opinion:

It is not found that the claimant was discharged as an act of sexual discrimination on the part of the employer. The evidence in this unemployment insurance case, without commenting upon what may be the result in his District Court case, does not substantiate the claimant's charge that he was discriminated against on the basis of sex. The employer attempted[**7] to insulate the claimant from the source of his problem in the work place resulting from a personal relationship with a co-employee. The claimant did not even attempt to give that arrangement an opportunity to work. The Appeals referee does not find that the claimant was fired as an act of retaliation as a result of his complaint to the Maryland OSHA. n2 The claimant was discharged because he had become so involved in his causes that he, on the employer's premises during working hours, was interfering [sic] with co-employees to the point that they felt it necessary to complain to management.

When he introduced a threat of future violence into these conversations, the employer was left with no alternative but to discharge the claimant. The claimant's actions had they been a present threat to do bodily harm or introduce violence into the work place, would have constituted, without question, gross misconduct. But when one considers the circumstances of the claimant in this case, the elements of deliberateness and willfulness are lacking and his actions are, therefore, not gross misconduct. There is no question, however, but that his badgering of his co-employees to the point that[**8] they complained does constitute misconduct and did justify his discharge and his disqualification under Section 6(c) of the Maryland Unemployment Insurance Law.

(footnote added).

-----Footnotes-----

n2 Ross had also complained of unsafe working conditions at COMSAT to Maryland authorities. That claim is not material to this appeal.

-----End Footnotes-----

Ross unsuccessfully appealed the Appeals Referee's decision to the ESA Board of Appeals, and then to the Circuit Court for Baltimore City, which affirmed the Board of Appeals' denial of benefits on [*359] September 20, 1983. Ross took no further appeals. The Appeals Referee rendered his decision while this action, filed March 3, 1982, was pending.

The district court turned first to the question of plaintiff's discharge. It specifically held that "the doctrine of collateral estoppel precludes plaintiff from here relitigating the issues (1) whether plaintiff's termination was based on his sex and (2) whether plaintiff was discharged in retaliation for his having filed charges with[**9] the EEOC," because it had been "conclusively established in other litigation that plaintiff was discharged because of misconduct." Observing that the issues of sex discrimination and retaliation were properly before the administrative agency, having been raised by plaintiff as alternative explanations for his discharge, the district court ruled that the administrative proceedings offered plaintiff a "full and fair opportunity " to litigate those claims and thus satisfied minimal due process requirements. Thus, the district court declared the following administrative findings binding in this Title VII action:

(1) that plaintiff was not discharged as an act of sexual discrimination on the part of defendant, his employer; (2) that plaintiff was not discriminated against on the basis of his sex; (3) that plaintiff was discharged for misconduct; (4) that, specifically, plaintiff was discharged because he became involved during work hours in his own causes and because he badgered and interfered with co-employees and (5) that defendant had no alternative but to discharge plaintiff when he threatened co-employees with future violence.

After disposing of plaintiff's discharge[**10] claims through collateral estoppel, the district court then turned to plaintiff's other claims of sex discrimination and retaliatory harassment while still an employee, and ruled all to be without merit. The sex discrimination issues are no longer pressed on appeal, and we need only focus on the alleged acts of retaliatory harassment. Although the district court did not expressly rely on collateral estoppel in this portion of its opinion, its rejection of the alleged instances of retaliatory harassment on the job clearly rested to some extent upon the findings of the Appeals Referee, already held binding by the district court. Thus, responding to plaintiff's contentions that defendant reduced his responsibilities and professional status, and denied him an annual review and salary and benefit increases, the district court stated:

Plaintiff was eventually fired because he became involved during work hours in his own causes, and because he badgered and interfered with co-employees. Moreover, as the Appeals Referee found, plaintiff told two other employees that he would 'blow away' someone if he failed to win his EEOC case. Under the circumstances, it was entirely appropriate[**11] for defendant to reduce plaintiff's responsibilities and to deny him salary and benefit increases.

Furthermore, the district court held that even if defendant disseminated information to prospective employers concerning plaintiff's discharge, plaintiff was entitled to no relief, reasoning as follows:

Assuming that defendant told prospective employers that plaintiff had been discharged for misconduct and that he had interfered with co-employees, such statements would not be actionable because they were clearly true. Defendant had every right to advise prospective employers that plaintiff had been discharged for misconduct and further to explain the nature of the misconduct in question.

The district court failed to make any finding on plaintiff's allegations that COMSAT had given false information to prospective employers prior to his discharge, and had told one prospective employer that Ross had filed an EEOC charge. n3 Addressing plaintiff's claim that he was retaliated [*360] against by the publication of an article about his EEOC discrimination charge in the COMSAT News Digest, the district court did not rely on any findings by the Appeals[**12] Referee, for there were none. Instead, the district court stated that the article was in no way prejudicial or retaliatory, because it accurately reported the facts. n4 Plaintiff now contends that publication of the article violated an EEOC policy of maintaining confidentiality on pending claims, a matter on which the district court made no findings. n5

-----Footnotes-----

n3 Plaintiff brought a related action against the prospective employer in question, and the EEOC determined in *Ross v. Applied Physics Laboratory of John Hopkins University*, Charge No. 033830283 (Aug. 10, 1983), that reasonable cause existed to believe that Ross had experienced retaliation for having filed an EEOC charge of discrimination against COMSAT. In particular, the EEOC found that "Respondent [Johns Hopkins] admits that an inquiry was made concerning Charging Party's [Ross's] technical qualifications and during this conversation with Charging Party's last employer [COMSAT] they were told in strictest confidence that they should not hire Charging Party because he had filed a complaint against them with the United States Equal Employment Opportunity Commission. "

This determination was made several months prior to the district court's decision on February 21, 1984, but apparently did not become a part of the record below until plaintiff submitted it as an exhibit with a post-judgment motion in opposition to defendant's request for attorney's fees. Plaintiff concedes that it was not before the district court at the time summary judgment was granted.

[**13]

n4 The entire news article in question, dated June 1, 1981 and reprinted from another publication, read as follows:

Satellite Television Corp., the COMSAT direct broadcast satellite subsidiary, says Equal Employment Opportunity Commission fact-finders are investigating a complaint of sex discrimination brought by one of its employees. Thomas J. Ross alleges that he was harassed, intimidated and subjected to terms of unequal employment because he rejected the sexual advances of a female co-worker.

n5 Defendant contends that the confidentiality issue was never raised before the district court, thereby precluding our consideration on appeal. See 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716 at 650-54 (1983). Defendant also asserts that the duty of confidentiality is limited to the Commission itself and does not bind the parties. See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.22. We do not decide the question of the confidentiality requirement or even whether the issue is properly before us, as we dispose of this appeal on other grounds.

In *Ross v. Comsat*, Charge No. 033830277 (May 23, 1984), the EEOC determined that reasonable cause existed to believe that Ross's retaliation charge was true, in part because publication of the news article by COMSAT violated the EEOC's confidentiality requirement for filed charges. Because this reasonable cause determination was not rendered

759 F.2d 355, *, 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

until after the district court granted summary judgment on February 21, 1984, it was never considered by the district court.

-----End Footnotes-----

[**14]

Based upon the foregoing analysis, the district court concluded that defendant was entitled to summary judgment under Fed.R.Civ.P. 56 as to all of plaintiff's claims, ruling that as a matter of law "plaintiff was not fired, harassed or discriminated against because of his sex, and that there was no retaliation of any sort undertaken by defendant against plaintiff because plaintiff had filed a complaint of sex discrimination with the EEOC."

II.

We first address the issue of whether the administrative findings of the Maryland ESA, as affirmed by the Circuit Court for Baltimore City, must be given collateral estoppel effect in this Title VII action. We hold that those administrative determinations do not preclude relitigation of the reason for plaintiff's discharge in federal court. [HN3] Under the "full faith and credit" mandate of 28 U.S.C. § 1738 (1982), the federal courts are required to give preclusive effect to state court judgments where the state courts themselves would do so. Yet, the district court neglected to examine Maryland case law in its collateral estoppel analysis. Had it done so, it would have recognized, as we do now, that the controlling decision of Maryland's highest court, *Cicala v. Disability Review Board for Prince George's County*, 288 Md. 254, 418 A.2d 205 (1980), will not permit preclusive effect to be accorded the findings of the Appeals Referee of the Maryland ESA.

Our analysis rests upon the Supreme Court's interpretation of 28 U.S.C. § 1738 in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982). *Kremer* held that [*361] "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." 456 U.S. at 466 (footnote omitted). n6 As the Court there observed, "it has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." 456 U.S. at 481-482. n7 A federal court may not, consistent with § 1738, elect to grant either less preclusive effect than would the state courts, or more. *Marrese v. American Academy of Orthopaedic Surgeons* [*16], 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327, 53 U.S.L.W. 4265, 4267-68 (1985). See *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, 896-98, 79 L. Ed. 2d 56 (majority opinion), 899-90 (White, J., concurring) (1984). Rather, the statute commands that we march in tandem, and our role is to determine what the state courts would do, confronted with an identical situation. State law governs, insofar as state law may be discerned.

-----Footnotes-----

n6 Section 1738 by its terms only applies to the judgments of state courts, not administrative agencies, and the Supreme Court made it clear in *Kremer* that unreviewed administrative determinations by state agencies do not preclude a trial de novo in federal court even if the administrative decision were to be afforded preclusive effect in state courts. 456 U.S. at 470 n.7. Here, plaintiff is potentially vulnerable to § 1738 only because he elected to appeal the administrative denial of unemployment benefits to the Circuit Court for Baltimore City, which affirmed the ESA. Plaintiff's claim could not be tried de novo in the state Circuit Court, under Md. Code Ann. art. 95A, § 7(h) (Cum. Supp. 1984). Nevertheless, *Kremer* states that "it is well established that judicial affirmation of an administrative determination is entitled to preclusive effect," and "there is no requirement that judicial review must proceed de novo if it is to be preclusive." 456 U.S. at 481 n. 21.

[**17]

n7 *Kremer* indicates that state rules both as to res judicata and collateral estoppel are to be applied in Title VII cases where there has been a prior state adjudication. See 456 U.S. at 478, 485.

-----End Footnotes-----

Here, having conceded the controlling effect of *Kremer*, the district court erred in neglecting to examine state law in its collateral estoppel ruling. The court's opinion is barren of any discussion of Maryland collateral estoppel principles or any citation to Maryland cases. Though *Kremer* itself accorded preclusive effect in a Title VII action to judicial affirmance of a determination by the New York State Division of Human Rights, the *Kremer* doctrine cuts both ways and may benefit as well as burden Title VII plaintiffs. Various results may ensue, depending upon which state's law applies and to which prior state proceedings that law is directed.

The Court of Appeals of Maryland, the state's highest tribunal, has adopted a narrow view of the preclusive effect of a prior judgment from an administrative agency in *Cicala v. Disability Review Board for Prince George's County* [**18], 288 Md. 254, 418 A.2d 205 (1980). *Cicala*, in our opinion, prevents the federal courts from according collateral estoppel effect to the state unemployment compensation findings adverse to Ross. *Cicala* presented the issue of whether a policeman's disability was "service connected" under the terms of the county Police Pension Plan. The Disability Review Board had ruled that it was not "service connected," although the Workmen's Compensation Commission had previously determined that the injury was "arising out of and in the course of his employment." Finding that res judicata principles did not apply to the workmen's compensation determination, the Court of Appeals affirmed the Board's denial of benefits.

Cicala establishes that [HN4] under Maryland law a judicial determination by one administrative agency is not binding on another adjudicator "which is seeking to determine an apparently identical issue under a different statute," 418 A.2d at 211, so long as there exist "substantial differences" [*362] between the statutes themselves. *Id.* at 212. In reaching its holding in *Cicala*, the Court of Appeals observed:

The underlying rationale for such a conclusion [**19] is that although the issues before the two administrative agencies may appear to be identical, generally they are not. This is so because different statutes have different legislative histories, purposes, scopes of coverage, language, standards, procedures and policies which may dictate opposite results.

418 A.2d at 211. Thus, the Court of Appeals reasoned that although the issues before the Board and the Commission both involved the question of whether an individual's injury was related to employment, they were not identical for res judicata purposes, for the pension plan and the workmen's compensation statute had "different origins, coverage, funding sources, procedures and standards." *Id.* at 213.

If the Maryland police disability plan and the workmen's compensation statute at issue in *Cicala* were so different as to preclude collateral estoppel, Title VII and the Maryland Unemployment Insurance Law cannot be construed as identical under the stringent analysis Maryland law requires. As in *Cicala*, the issues in both proceedings appear to be similar. Yet the statutes themselves manifest substantial differences. Each statute has distinct enforcement procedures. [**20] See 42 U.S.C. § 2000e-5; Md. Code Ann. art. 95A, § 7 (1979 & Cum. Supp. 1984). The purposes of the two statutes are unrelated. As stated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), Title VII aims to "achieve equality of employment opportunities and remove barriers that have operated in the past." By contrast, the Unemployment Insurance Law concerns "persons unemployed through no fault of their own." Md. Code Ann. art. 95A, § 2 (1979).

This distinction in purposes is reflected in the actual standards of recovery. [HN5] Under Title VII, 42 U.S.C. § 2000e-3(a), it is an "unlawful employment practice for an employer to discriminate against any [employee] . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." [HN6] Md. Code Ann. art. 95A, § 6(c) requires that an individual be temporarily disqualified for unemployment benefits if discharged "for misconduct connected with his work." The ESA Board of Appeals has defined "misconduct" [**21] "as 'a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee.'" *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113, 117 (1974). Thus, while a Maryland administrative adjudicator is concerned with

forbidden conduct on the part of the employee, Title VII directs the factfinder's attention to a forbidden motive on the part of the employer.

Such distinctions are meaningful because Maryland law makes them so. Whether the due process clause would permit preclusive effect to be assigned judicially affirmed findings of the Maryland ESA we need not decide. See *Kremer*, 456 U.S. at 481. We are convinced, in light of the foregoing considerations, that the Maryland courts would find that the issue resolved by the Appeals Referee, and that to be decided under Title VII, are not identical for collateral estoppel purposes. n8

-----Footnotes-----

n8 COMSAT seeks to distinguish *Cicala* on two grounds, neither of which is persuasive. First, COMSAT contends that *Cicala* dealt only with the doctrine of *res judicata*, or claim preclusion, while it asserts collateral estoppel or issue preclusion. This is a spurious exercise in legal semantics. *Res judicata* and collateral estoppel are "related doctrines," *Kremer*, 456 U.S. at 467 n.6; *Allen v. McCurry*, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980), and "*res judicata*" is often employed broadly to encompass both claim and issue preclusion. See, e.g. *Restatement (Second) of Judgments* at 131 (1982); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4402 (1981). While the Court of Appeals in *Cicala* consistently spoke of "*res judicata*," it is obvious that *Cicala* can only be referring to collateral estoppel, or issue preclusion, for no theory of claim preclusion could possibly have been maintained under the facts there presented.

We also reject COMSAT's suggestion that *Cicala* no longer governs once the decision of an administrative adjudicator has been affirmed by a state court. The essential problem confronting the Court of Appeals in *Cicala* was whether the issues presented by two statutes with different purposes and standards could be regarded as the same for collateral estoppel purposes. We can see no sensible reason why Maryland courts would abandon the stringent analysis of *Cicala* for a more relaxed standard merely because a party has elected to appeal from the administrative factfinder to a state court bound to uphold the agency's determinations if supported by "substantial evidence." Md. Code Ann. art. 95A, § 7(h).

-----End Footnotes-----

[**22]

[*363] III.

In denying preclusive effect to the findings of the Maryland ESA, we do not imply that those proceedings are irrelevant. In assessing the genuineness of the issues presented, the district court will be entitled to consider evidence brought out at the state unemployment compensation proceedings, but not to consider itself precluded by the state adjudicator's conclusions. Similarly, any EEOC proceedings, while they may be relevant to summary judgment, are no substitute for an independent judgment on the part of the district court. See *Kremer*, 456 U.S. at 470 n.7.

In this case we are not satisfied that an independent judgment was made. The district court's grant of summary judgment for COMSAT rested on the erroneous premise that crucial factual issues were precluded from relitigation by collateral estoppel. The district court relied entirely upon the findings of the ESA Appeals Referee in resolving Ross's claim of retaliatory discharge. While it is less certain how the district court concluded that Ross's retaliatory harassment claim was meritless in all aspects, it is apparent that the district court relied heavily on the Appeals Referee's resolution of the[*23] disputed facts.

For example, the district court considered it proper for COMSAT to have reduced Ross's responsibilities and denied him benefits because he had interfered with co-employees during working hours and threatened violence, citing expressly to the Appeals Referee's opinion. Further, the district court thought Sparrow's negative reference given to a prospective employer of Ross "clearly true" because Ross had been discharged for misconduct. Thus, the district court committed reversible error, for its findings embodied the assumption that the earlier Maryland procedure was preclusive. An independent examination of the record to determine whether the evidence reveals "a genuine issue as to any material fact," Fed.R.Civ.P. 56(c), was required.

In our opinion, the sound course is to reverse the summary judgment and remand this case to the district court for reconsideration of the propriety of summary judgment on each aspect of plaintiff's retaliatory discharge and harassment claims, and for trial should the evidence on any claim disclose a genuine issue of material fact. It is true that summary judgment presents a legal question, whether "the moving party is entitled to a[*24] judgment as a matter of law." Fed.R.Civ.P. 56(c). An appellate court has power to determine independently whether summary judgment may be upheld on an alternative ground where the basis chosen by the district court proves erroneous. See *Charbonnages de France v. Smith*, 597 F.2d 406, 416 (4th Cir. 1979); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716 at 657-60 (1983). This case, however, involves a complex array of subsidiary claims within the major categories of discharge and harassment, and, given the factual disputes, it is not clear that the district court could have accorded summary judgment on all the questions presented had preclusive effect not been given to the findings of the Appeals Referee. Allowing the district court to determine initially from all the evidence whether any genuine issues of material fact are presented will promote an informed decision, better frame [*364] the contentions of the parties, and ensure a proper record for review.

IV.

As we have elected to remand this case for reconsideration of summary judgment and trial if necessary, we must provide guidance as to the governing law of Title VII retaliation cases within[*25] this Circuit. Defendant contends that Ross must prove ultimately that he would not have been discharged or harassed "but for" the filing of his EEOC charges. Plaintiff argues that he need only show that retaliation for filing charges was "in part" a reason for the adverse employer actions. We conclude that the more stringent "but for" test should be followed in this Circuit, rejecting the "in part" formulation as contrary to both precedent and sound policy.

The general principles of summary judgment, though for the most part settled, bear review here both to aid the district court's task on remand, and because of their relevance to our ultimate inquiry. [HN7] The burden is on defendant, as the moving party, to demonstrate the absence of any genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to plaintiff, as the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, [*26] 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). Only where it is "perfectly clear that there are no issues in the case" is summary judgment proper, and even where a directed verdict would be proper after hearing the evidence, the district court should not try the case in advance by summary judgment. *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 96 L. Ed. 666, 72 S. Ct. 178 (1951). The nonmoving party is in a favorable posture, being entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered." *Charbonnages*, 597 F.2d at 414.

[HN8] In determining whether summary judgment may be granted, the district court must perform a dual inquiry into the genuineness and materiality of any purported factual issues. Whether an issue is genuine calls for an examination of the entire record then before the court in the form of pleadings, depositions, answers[*27] to interrogatories, admissions on file and affidavits, under Rule 56(c) and (e). Though the burden of proof rests initially with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the nonmoving party must produce "specific facts showing that there is a genuine issue for trial," rather than resting upon the bald assertions of his pleadings. Fed.R.Civ.P. 56(e). See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes. See *Cole v. Cole*, 633 F.2d 1083, 1089 (4th Cir. 1980); *Atlantic States Construction Co. v. Robert E. Lee & Co.*, 406 F.2d 827, 829 (4th Cir. 1969).

Care is required in deciding whether the evidence presents a genuine issue of motive, for "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense." *Charbonnages*, 597 F.2d at 414. Resolution of[*28] questions of intent often depends upon "the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during

759 F.2d 355, *; 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

direct and cross-examination." *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141 [*365](4th Cir. 1979). We do not suggest, however, that summary judgment has no role in Title VII litigation. "The fact that motive is often the critical issue in employment discrimination cases does not mean that summary judgment is never an appropriate vehicle for resolution." *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1272 (4th Cir. 1981) (emphasis in original). Unsupported allegations as to motive do not confer talismanic immunity from Rule 56.

Even where an issue is genuine, it must prove material as well to escape summary judgment, and at this stage the "but for" test becomes relevant. Given the conflicts in the evidence here, it is possible that defendant would be unable to demonstrate beyond dispute at the summary judgment stage that retaliation played no part in the harassment or discharge of Ross, and yet conclusively show that Ross's conduct was so[**29] inexcusable that COMSAT would have been required to discharge him in any event. As the parties have briefed and argued the question of the applicable test in this Circuit, and it is likely that the choice of tests could determine 1) whether some or all of the retaliation issues can be disposed of by summary judgment, or 2) if tried, how they will be resolved, our consideration of the matter is proper. See *United States v. Adamson*, 665 F.2d 649, 656 n. 19 (5th Cir. 1982), cert. denied, 464 U.S. 833, 104 S. Ct. 116, 78 L. Ed. 2d 116 (1983).

[HN9] The sequence of proof and burdens prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) are applicable to retaliation cases under § 2000e-3 as well as to discriminatory treatment claims. *Williams v. Boorstin*, 213 U.S. App. D.C. 345, 663 F.2d 109, 116 (D.C. Cir. 1980); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980). The employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima[**30] facie case consists of three elements: 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action. n9 See, e.g., *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981); *Womack*, 619 F.2d at 1296; *Czarnowski v. Desoto, Inc.*, 518 F. Supp. 1252, 1257 (N.D. Ill. 1981); *Sogluizzo v. Local 817, International Brotherhood of Teamsters*, 514 F. Supp. 277, 280 (S.D. N.Y. 1981); *Kralowec v. Prince George's County*, 503 F. Supp. 985, 1008 (D. Md. 1980), aff'd, 679 F.2d 883, cert. denied, 459 U.S. 872, 74 L. Ed. 2d 132, 103 S. Ct. 159 (1982). As in disparate treatment cases, the burden of establishing a prima facie retaliation case "is not onerous." *Burdine*, 450 U.S. at 253. Once a prima facie case has been presented, the employer then has the burden of producing a legitimate nondiscriminatory reason for the adverse action, thereby rebutting the presumption of retaliation raised by the prima facie case. *Womack*, 619 F.2d at 1296. The employer is not required to prove the absence of a retaliatory motive, but only[**31] to raise a "genuine issue of fact," *Burdine*, 450 U.S. at 254, as to whether retaliation for protected activity occurred. Finally, if the employer produces a legitimate nondiscriminatory explanation, the employee bears the ultimate burden of proving retaliation by demonstrating that the employer's proffered reason is pretextual. *Womack*, 619 F.2d at 1296.

-----Footnotes-----

n9 The employer's knowledge that the employee has engaged in protected conduct is not really a distinct element, as suggested by some courts, see, e.g. *Kralowec v. Prince George's County*, 503 F. Supp. 985, 1008 (D. Md. 1980), but is necessarily subsumed in the requirement of a causal connection, for if the employer did not know of the protected activity a causal connection to the adverse action cannot be established.

-----End Footnotes-----

[HN10] For the employee to disprove a legitimate nondiscriminatory explanation for adverse action, the third stage of the *Burdine* analysis, we determine that he must [*366] show that the adverse action would not have occurred "but[**32] for" the protected conduct. We reject the view that Title VII has been violated if retaliation for protected activity was merely "in part" a reason for the adverse action.

The trend among the circuits is clearly in favor of the "but for" standard, or similar formulations. See *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 345 (9th Cir. 1982); *Smalley*, 640 F.2d at 769; *Williams*, 663 F.2d at 117; *Montiero v. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980); *Womack*, 619 F.2d at 1297. But see *Cohen v. Fred Meyer, Inc.*, 686

759 F.2d 355, *, 1985 U.S. App. LEXIS 30421, **;
37 Fair Empl. Prac. Cas. (BNA) 797; 36 Empl. Prac. Dec. (CCH) P35,103

F.2d 793, 798 (9th Cir. 1982). This Circuit has previously expressed a preference for the "but for" test as well. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 669 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984). The "but for" standard serves the salutary function of directing the factfinder's attention to the predominant reason for an employer's adverse action. It ensures that no employee will suffer prejudice by exercising his lawful right to protest perceived discrimination.

Under an "in part" test the filing of unfounded discrimination charges [**33] with the EEOC might well be encouraged, as the employee would thereby be insulated from adverse action notwithstanding egregious misconduct, if the employer committed the error of giving any consideration to the EEOC charge. Title VII serves the laudable goal of protecting employee access to agencies and courts. It does not shield employees from normal sanctions for misconduct. "It would be incongruous -- and certainly not required by law -- to give any employee, even one engaged in exemplary efforts to vindicate the law of the land, a stranglehold on a job irrespective of that employee's material, work-related flaws." Williams, 663 F.2d at 116-17.

Finally, Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2. The prohibition on retaliation exists simply to ensure that employees will not fear to assert their substantive rights, which are the heart of Title VII. Claimed violations of § 2000e-2 are resolved by the "but for" standard. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n. 10, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). In the absence of strong contrary [**34] policy considerations, conformity between the provisions of Title VII is to be preferred.

V.

In sum, on remand the district court must determine whether all supporting evidence, with the benefit of all conflicting inferences for plaintiff, creates a genuine factual question that "but for" plaintiff's filing of the charges with the EEOC, he would not have suffered harassment at the hands of his employer or dismissal from his job. If so, summary judgment is precluded and the case must proceed to trial.

REVERSED AND REMANDED.

MELVIN J. RUSH, Plaintiff-Appellant, v. ROWAN-SALISBURYBOARD OF EDUCATION; JOSEPH MCCANN, Individually, in his official capacity, and as an agent of the board; N. WINDSOR EAGLE, Individually, in his official capacity, and as an agent of the board; DANNY THOMAS, Individually, in his official capacity, and as an agent of the board; DONALD MARTIN, Individually, in his official capacity, and as an agent of the board, Defendants-Appellees.
No. 96-2462

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1997 U.S. App. LEXIS 29117

October 7, 1997, Submitted
October 23, 1997, Decided

NOTICE:

[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 127 F.2d 1100, 1997 U.S. App. LEXIS 25187.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., Chief District Judge. (CA-95-405-4).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, an employee of the public school system, appealed an order from the United States District Court for the Middle District of North Carolina, which granted summary judgment in favor of defendants, board of education and its members, in his employment action alleging Title VII, 42 U.S.C.S. § 1983, and First Amendment violations.

OVERVIEW: On appeal from the district court's grant of summary judgment for defendants, plaintiff argued that defendants failed to select him for the position of assistant principal based on his race. The court affirmed the district court's order, finding that, even assuming that plaintiff established a prima facie case of race discrimination under Title VII, defendants came forth with the legitimate non-discriminatory reason for their ultimate selection of another candidate. With regard to plaintiff's assertion that he received a substandard performance evaluation based upon his statements that reflected his beliefs of a racial atmosphere within the school system, the court found that the First Amendment claim would not have survived summary judgment even if plaintiff had properly raised it before the district court. Although plaintiff's comments on racial relations arguably related to an issue of public interest, many of the comments related directly to other school and school board employees and as such were likely to create a level of animosity that would have hindered the efficient operation of the school and board.

OUTCOME: The court affirmed the district court's grant of summary judgment in favor of defendants in plaintiff's employment action alleging Title VII, § 1983, and First Amendment violations.

CORE TERMS: First Amendment, First Amendment's, summary judgment, middle school, materially, select, race discrimination, adverse change, balancing test, school system, superintendent, transferred, candidate, prevail, school board, pretext

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN1] To establish a retaliatory claim under the First Amendment, a public employee must meet a two-pronged test. First, to merit First Amendment protection, the speech at issue must relate to matters of public interest and the employee's interest in free expression must outweigh the employer's interest in efficient operation of the workplace. Second, the employee must demonstrate that his protected speech was a substantial factor in the employer's decision.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN2] Only infrequently is it "clearly established" that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a "particularized balancing" that is subtle, difficult to apply, and not yet well-defined.

COUNSEL: S. Luke Largess, FERGUSON, STEIN, WALLAS, ADKINS, GRESHAM & SUMTER, P.A., Charlotte, North Carolina, for Appellant.

J. Reed Johnston, Jr., Denis E. Jacobson, TUGGLE, DUGGINS & MESCHAN, P.A., Greensboro, North Carolina, for Appellees.

JUDGES: Before HALL, HAMILTON, and MICHAEL, Circuit Judges.

OPINION: PER CURIAM:

Melvin J. Rush appeals from the district court order granting summary judgment in favor of the Defendants in his employment action alleging Title VII, 42 U.S.C. § 1983 (1994), and First Amendment violations. We affirm.

Rush, an employee of the public school system, first argues on appeal that the Defendants failed to select him for the position of assistant principal of a middle school based on his race--African-American. We find that even assuming that Rush has established a prima facie case of race discrimination under [*2]Title VII, the Defendants have come forth with a legitimate non-discriminatory reason for their ultimate selection of another candidate. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) (explaining burden-shifting scheme). The superintendent was seeking an individual to handle disciplinary matters within the school and the candidate selected had past experience in this area, having served as a suspension coordinator at another middle school and twenty-seven years in the Marine Corps. Rush, however, as a guidance counselor had limited experience in the area of discipline and dealing with students on the middle school level.

Rush attempts to demonstrate that this proffered explanation was pretext for unlawful race discrimination by drawing attention to the fact that, with rare exception, the superintendent always recommends and the school board always selects the principal's first choice for this position, which in this case was Rush. On the only other occasion where the principal's choice was not selected, Rush contends that the decision was made to select an African-American applicant in order to gain an African-American presence in the school as well as in the administration. [*3] He notes that were he selected to fill the position of assistant principal, it would be the first time that the school system had two African-American administrators. We find these facts insufficient to create an inference of pretext and accordingly believe that the district court properly granted summary judgment in favor of the Defendants on this claim.

Rush next asserts that he received a substandard performance evaluation based upon certain statements he had made which reflected his beliefs of a racial atmosphere within the school system. He contends that the district court erred in not considering this claim. We note, however, that Rush failed to present this claim to the district court. Instead, he argued only that the poor performance evaluation was based upon his race, an argument which he does not raise on appeal. Nonetheless, we find that a First Amendment claim would not have survived summary judgment. [HN1] To establish a retaliatory claim under the First Amendment, a public employee must meet a two-pronged test. First, to merit First Amendment protection, the speech at issue must relate to matters of public interest and the employee's interest in

free expression must outweigh [*4]the employer's interest in efficient operation of the workplace. Second, the employee must demonstrate that his protected speech was a substantial factor in the employer's decision. See *Hanton v. Gilbert*, 36 F.3d 4, 6-7 (4th Cir. 1994).

Here, Rush's comments on racial relations may arguably relate to an issue of public interest. However, many of these comments related directly to other school and school board employees and as such were likely to create a level of animosity which would hinder the efficient operation of the school and board. Rush's pointed and personal comments stand in stark contrast to those found by this Court to merit First Amendment protection in *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996), and we find that given the disruption such comments would likely cause, Rush could not prevail under the First Amendment's balancing test. See *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (stating that [HN2] "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not[*5] yet well-defined").

Finally, Rush argued that he was impermissibly transferred to a different school in retaliation for his aforementioned statements and EEOC charges in violation of Title VII and the First Amendment's protection of free speech. The district court granted summary judgment on this claim, noting that because he was transferred without a loss of pay or benefits Rush did not suffer a "materially adverse change in the conditions of his employment," and thus could not prevail. On appeal, Rush concedes that in order to establish a claim under Title VII he must show a materially adverse change in the conditions of his employment. He asserts, however, that no such showing is necessary to establish a First Amendment claim. In support of this position, he cites to *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990), for the holding that an employment action implicating the First Amendment need not be materially adverse. We discern no such holding in *Rutan*. Rather, the Court in *Rutan* simply rejected the defendants' assertion that the particular employment decisions at issue were not adverse. See *id.* at 73. We further note that a plethora of First Amendment[*6] cases speak in terms of adverse employment decisions, and accordingly we do not construe *Rutan* to eliminate that requirement. See, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 466, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995). Even assuming, however, that such a showing is not required, we would find, for the reasons stated above, that Rush has not demonstrated that his speech was protected under the First Amendment's balancing test.

Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

STEVEN A. SHAPIRO v. ALAN D. MASSENGILL AND ALAN D. MASSENGILL, P.A.
No. 999, SEPTEMBER TERM, 1994

COURT OF SPECIAL APPEALS OF MARYLAND

1995 Md. App. LEXIS 105

June 1, 1995, Filed

SUBSEQUENT HISTORY: As Corrected June 7, 1995. As Corrected September 18, 1995.

PRIOR HISTORY: [*1] APPEAL FROM THE Circuit Court for Montgomery County. J. James McKenna, JUDGE.

DISPOSITION: JUDGMENT REVERSED AS TO DEFAMATION CLAIM ONLY AND REMANDED FOR NEW TRIAL; JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee brought an action against appellee employer for breach of contract, wrongful discharge, and defamation. The Circuit Court for Montgomery County (Maryland) entered judgment in favor of the employer. The employee appealed.

OVERVIEW: The employee was discharged on the basis that during employment negotiations between the parties, both lawyers, the employee failed to inform the employer that his former employer was under federal investigation for fraud in which the employee had some involvement. The employee alleged, inter alia, that the trial court erred in ruling that the employer's oral statements to other employees regarding the employee's discharge were not defamatory per se and in refusing to allow the jury to consider the statements. The employee claimed that the employer's statements denigrating his integrity harmed him professionally. The court agreed with the employee. The court held that allegations that the employee was dishonest and possibly a criminal, if found to be false, clearly imputed to the employee a lack of qualification incident to the practice of law. Such statements were defamatory per se, as was a letter sent to the unemployment office that accused the employee of outright deceit. Although the letter had been submitted to the jury, the court ruled that both the letter and the oral statements should have been considered collectively on the issues of fault, privilege, and damages.

OUTCOME: The court affirmed the lower court's judgments in favor of the employer with respect to the breach of contract and wrongful discharge claims. The judgment in favor of the employer on the employee's claim of defamation was reversed, and the claim was remanded for new trial.

CORE TERMS: public policy, defamatory, disclose, criminal investigation, defamation, employment contract, misconduct, actionable, fixed term, duty, at-will, terminated, constitutional malice, injurious, quod, wrongful discharge, matter of law, negotiations, termination, discharged, indicted, privacy, ambiguity, good cause, interview, terminate, servant, fault, evil, failure to disclose

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN1] An employment agreement may either be for a fixed term or at will. An employer or an employee may terminate an at-will employment relationship, for almost any reason or no reason, at any time. An employment contract is deemed at will, and therefore terminable without cause, when it does not expressly specify a particular time or event terminating the employment relationship. On the other hand, when an employment contract specifies a definite term, it may only be terminated prior to the end of the term for just cause.

Contracts Law: Contract Interpretation: Interpretation Generally

[HN2] Construction of a contract is, in the first instance, a question of law for the court to resolve. Where the language of a contract is clear and unambiguous, there is no room for construction and the court must presume that the parties meant what they expressed. But if the contractual language is ambiguous, the meaning of the contract is a matter for the trier of fact to resolve.

Contracts Law: Contract Interpretation: Ambiguities & Contra Proferentem

[HN3] In deciding whether a contract is ambiguous, the trial court must analyze the language of the contract, based on the plain meaning of the words used.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN4] Whether a contract is term or at-will may turn on the intent of the parties.

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review

Contracts Law: Contract Interpretation: Ambiguities & Contra Proferentem

[HN5] The court reviews the trial court's threshold decision of ambiguity based on the clearly erroneous standard of Md. R. App. Review, Ct. App., & Ct. Spec. App. 8-131(c). A trial court's conclusion that ambiguity exists in a writing is an exercise in judgment which should be overturned only if no reasonable suggestion of ambiguity can be entertained.

Contracts Law: Contract Interpretation: Ambiguities & Contra Proferentem

[HN6] Ambiguity derives from a review of the contract as a whole.

Civil Procedure: Jury Trials: Jury Instructions

[HN7] Under Md. R. Civ. P., Cir. Ct. 2-520(b), the trial court must instruct the jury upon the law, either by giving particular instructions offered by the parties, by crafting its own, or by combining elements of both. A party is entitled to have his or her theory of the case presented to the jury, provided that the theory is legally and factually supported. The trial court, however, need not give any particular requested instruction if the matter is fairly covered by instructions actually given, Rule 2-520(b), so long as the instructions correctly state the law. If the instructions constitute a clear and accurate expression of the law, the court will not reverse merely because of a failure in form.

Labor & Employment Law: Wrongful Termination: Defenses

[HN8] When an employer, because of an employee's wrongful conduct, can no longer place the necessary faith and trust in an employee, he is entitled to dismiss such employee without penalty. This is especially true where the employee has a responsible position where faith and trust are required.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN9] The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time. Nonetheless, there is a narrow exception to that rule, when the discharge contravenes a clear mandate of public policy.

Labor & Employment Law: Wrongful Termination

[HN10] The tort of wrongful or abusive discharge is defined as the willful termination of employment by the employer because of the employee's alleged failure to perform in accordance with the employer's expectations and the termination is contrary to a clear mandate of public policy. Specifically, in order to state a claim for wrongful discharge, the employee must demonstrate: (1) that the employee was discharged; (2) that the dismissal violated some clear mandate of public policy; and (3) that there is a nexus between the defendant and the decision to fire the employee. To prevail, however, the employee must demonstrate the policy in question with clarity, specificity, and authority: Recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of the case, a practice which should be employed sparingly, if at all.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] In a case involving a plaintiff who is not a public figure, a prima facie case of defamation requires proof of the following elements: (1) that the defendant made a defamatory communication - i.e., that he communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized

the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN12] In defamation actions, "fault," for the purposes of the prima facie case, may be based either on negligence or constitutional malice. Constitutional malice, which is sometimes referred to as actual malice, is established where the plaintiff shows, by clear and convincing evidence, that the defendant published the statement in issue either with reckless disregard for its truth or with actual knowledge of its falsity.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN13] Maryland recognizes the distinction between defamation per se and defamation per quod.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN14] In the case of words or conduct actionable per se their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable only per quod, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN15] The determination of whether an alleged defamatory statement is per se or per quod is a matter of law. If the statement is per quod, then the jury must decide whether, by reason of extrinsic circumstances, the statement carries a defamatory meaning.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN16] The significance of whether the defamation is per se or per quod turns on the degree of fault; even if the statement is actionable per se, the plaintiff must prove actual damages when the defendant was merely negligent in making the false statement. But where a plaintiff can establish constitutional malice, a presumption of harm to reputation still arises from the publication of words actionable per se. A trier of fact is not constitutionally barred from awarding damages based on that presumption in a constitutional malice case. Therefore, if a plaintiff can demonstrate constitutional malice, the jury may award general damages for false words that are actionable per se, even in the absence of proof of harm.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN17] It is defamatory to utter any slander or false tale of another which may impair or hurt his trade or livelihood. This is not to imply, however, that every negative evaluation of an employee's performance is potentially defamatory. Rather, the words must go so far as to impute to him some incapacity or lack of due qualification to fill the position. The defamatory statement must be such that if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed.

COUNSEL: ARGUED BY Julian S. Greenspun (Michael J. Dixon and Storch & Brenner on the brief) all of Washington, DC., FOR APPELLANT.

ARGUED BY Richard E. Schimel (Budow and Noble, P.C. on the brief) all of Bethesda, MD., FOR APPELLEES.

JUDGES: ARGUED BEFORE WILNER, C.J., MOYLAN, and HOLLANDER, JJ.

OPINIONBY: HOLLANDER

OPINION: Opinion by Hollander, J.

"An eminent lawyer cannot be a dishonest man," Daniel Webster once said. n1 This thought underlies the employment dispute between two attorneys--one who fired an associate out of distrust for his integrity and his judgment, and the other who claims he was defamed and wrongly discharged. Appellant Steven A. Shapiro was terminated from employment by appellees Alan D. Massengill and Alan D. Massengill, P.A. because, during employment negotiations, Shapiro did not inform Massengill that his former employer was under federal investigation for fraud involving a

contract with which Shapiro had some involvement. After [*2]the discharge, Shapiro filed suit in the Circuit Court for Montgomery County, alleging three claims: breach of contract, wrongful discharge, and defamation. The jury returned a verdict for appellees on all claims, and Shapiro has appealed.

-----Footnotes-----

n1 Address to Charleston, S.C. Bar, May 10, 1847. Quoted from DAVID S. SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER P 75.67, at 188 (1986).

-----End Footnotes-----

Issues Presented

Shapiro presents a pentad of issues for our review:

1. Did the Court err by refusing to instruct the jury that if they found it was a minimum term contract, then under *Dorrance v. Hoopes*, 122 Md. 344, 90 A.2d 92, 94 (1914), it could only be broken before the end of the term by conduct which was gross, evil or actually injurious to the employer's business?
2. Did the Court err by not ruling as a matter of law that the employment agreement was a minimum term contract?
3. Did the Court err by refusing to instruct the jury on whether a job applicant has a duty [not] [*3] to disclose to prospective employers that his current employer is or had been under investigation?
4. Did the Court err by not ruling that Massengill's written and verbal statements to his employees and the unemployment office were defamatory per se?
5. Did the Court err in withdrawing punitive damages from jury consideration?

Our review of the record leads us to conclude that the court did not err in declining to rule, as a matter of law, that the employment contract in dispute was a term contract. Further, the court did not err in its instructions as to the concept of "good cause" to justify termination of a term contract, or in its instructions as to the tort of abusive discharge. We agree with Shapiro, however, that the court erred with respect to appellant's defamation claim and shall reverse and remand as to that claim only. As a result, we decline to reach the punitive damages issue.

We shall address the substance of each assertion, but in a varied order, and not exactly as appellant has presented them.

Factual Summary

For the purposes of this appeal, most of the relevant facts are undisputed.

Shapiro became a member of[*4] the West Virginia Bar in 1983. Thereafter, in 1986, Shapiro began working for Contel Federal Systems, Inc. ("Contel"), as one of twelve in-house contracts administrators. The federal government was one of Contel's customers. In August 1990, the Army discovered a discrepancy in a claim for payment submitted by Contel and initiated an investigation. Although Shapiro had not prepared the bills that were the focus of the investigation, he had drafted a transmittal letter for one of the bills in question. Nevertheless, Shapiro was never a subject of the investigation. Ultimately, the Army concluded that the discrepancies resulted from clerical error and no charges were ever lodged against anyone.

Even before the commencement of the Contel investigation, Shapiro had decided to pursue a private law practice. Accordingly, in July 1990, he took the Maryland Bar examination, which he passed, and began searching for opportunities to develop a law practice. In December 1990, Shapiro met Massengill, who expressed an interest in expanding his firm's practice, which then consisted primarily of personal injury and domestic cases, to include business and government contract components. During the[*5] negotiations which ensued, Shapiro made clear that he wanted a secure position, lasting at least a year, that could provide him with an opportunity to develop a client base for his own practice. Shapiro concedes that, during his employment discussions with Massengill, he never advised Massengill of the Contel investigation.

On January 31, 1991, Shapiro received an employment contract and an accompanying cover letter from Massengill. Shapiro promptly signed the contract and, on April 1, 1991, he began working for Massengill. Of particular relevance to this dispute, the contract provided:

I expect the term of this arrangement to go for at least one year, assuming we both continue working as we anticipate. However, we each reserve the right to cancel the arrangement after 9 months with the next 90 days to count as part of the year.

If our efforts are successful, I expect to increase your salary appropriately each year after the first year. We will have to negotiate this based upon clients, earnings, and profits. . . . Also, it is my intent that if we are successful and work well together, then I will consider having you become a junior partner at the end of 3[*6] years.

(Emphasis added).

On April 24, 1991, just three weeks after Shapiro began working for Massengill, Phillip Radoff, Contel's general counsel, advised Shapiro that the Army wanted to conduct a final interview of Shapiro before closing the investigation. The interview was purely voluntary; Shapiro could have declined to be interviewed. Radoff informed Shapiro that Contel would hire an attorney to represent Shapiro at this interview, if he wanted one. Shapiro then informed Massengill of the Contel investigation and his impending interview.

Massengill was angry that Shapiro had failed to inform him of the investigation, that Shapiro could be a witness in criminal proceedings, or perhaps--in the worst case--that Shapiro himself could even be indicted. Shapiro explained to Massengill that he did not disclose the Army's inquiry earlier because no one at Contel had ever been implicated of wrongdoing, he believed the matter had essentially been resolved prior to the time that he met Massengill, and he was never a subject of the inquiry. Moreover, he considered the investigation "insignificant," and therefore did not think it necessary to disclose it during his employment discussions[*7] with Massengill. Although Shapiro acknowledged that "anything is possible," he steadfastly denied that he could be indicted.

In addition, Shapiro specifically asked Massengill to call Radoff to confirm his story, but Massengill never did so. Nor did Massengill take any other steps to verify Shapiro's account. Instead, on May 3, 1991, just a month after Shapiro began working for Massengill, Shapiro was fired. Shortly thereafter, at a meeting of the firm's employees, Massengill explained his decision to discharge Shapiro.

Subsequently, at Shapiro's request, the Army's Special Agent in charge of the Contel investigation wrote Massengill a letter, dated May 16, 1991, confirming that "Mr. Shapiro was never the target of this investigation, nor has any wrongdoing been attributed to him." At trial, through deposition testimony, Massengill acknowledged that this letter reflected what Shapiro had told him on April 24, 1991. Massengill nonetheless sent a statement to the Department of Employment and Economic Development ("DEED"), dated May 20, 1991, opposing Shapiro's claim for unemployment benefits. n2

-----Footnotes-----

n2 DEED awarded Shapiro full unemployment benefits. Massengill appealed this decision, but the DEED Board of Appeals affirmed the award. Thereafter, Shapiro re-applied for further benefits. On August 28, 1991, upon inquiry by

DEED, Massengill sent an identical copy of the allegedly defamatory statement to DEED. The parties dispute whether Massengill intended this second statement as an opposition to Shapiro's receipt of subsequent benefits.

-----End Footnotes-----

[*8]

Additional facts will be included where pertinent to our discussion of the issues presented.

Discussion

I. Breach Of Contract

A. Term vs. At-Will

Appellant argues that the employment contract was unambiguous and, therefore, the court erred in submitting to the jury the issue of whether the contract was terminable at will or provided a definite term. Instead, he claims the court should have ruled, as a matter of law, that the contract created a fixed term of employment.

[HN1] An employment agreement may either be for a fixed term or at will. *Hrehorovich v. Harbor Hospital*, 93 Md. App. 772, 790, 614 A.2d 1021 (1992), cert. denied, 330 Md. 319, 624 A.2d 490 (1993); *Chai Mgmt., Inc. v. Leibowitz*, 50 Md. App. 504, 513 (1982). Generally, an employer or an employee may terminate an at-will employment relationship, for almost any reason or no reason, at any time. *Lee v. Denro*, 91 Md. App. 822, 829, 605 A.2d 1017 (1992); *Beery v. Md. Medical Laboratory*, 89 Md. App. 81, 94, 597 A.2d 516 (1991); *Haselrig v. Publ. Storage, Inc.*, 86 Md. App. 116, 122, 585 A.2d 294 (1991); *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 338, 517 A.2d 786 (1986); see also *Adler v. Amer. Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464 (1981).[*9] An employment contract is deemed at will, and therefore terminable without cause, when it does not expressly specify a particular time or event terminating the employment relationship. *Staggs v. Blue Cross of Md., Inc.*, 61 Md. App. 381, 388, 486 A.2d 798, cert. denied, 303 Md. 295, 493 A.2d 349 (1985). On the other hand, when an employment contract specifies a definite term, it may only be terminated prior to the end of the term for just cause. *Chai Mgmt.*, 50 Md. App. at 513.

Shapiro alleges that Massengill breached the employment agreement by terminating him, without good cause, before the expiration of the term. Therefore, whether the employment contract was at will or for a fixed term is significant. If it was at will, as appellees claim, then Massengill was entitled to terminate Shapiro with or without good cause. But if it was for a stated term, as Shapiro argues, then the employer could only fire Shapiro for sufficient cause.

[HN2] Construction of a contract is, in the first instance, a question of law for the court to resolve. *Suburban Hosp. v. Dwiggins*, 324 Md. 294, 306, 596 A.2d 1069 (1991). Where the language of a contract is clear and unambiguous, there is no room for construction and we "must presume[*10] that the parties meant what they expressed." *Gen'l Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261-62, 492 A.2d 1306 (1985). But if the contractual language is ambiguous, the meaning of the contract is a matter for the trier of fact to resolve. *Fournier v. U.S. Fidelity & Guaranty Co.*, 82 Md. App. 31, 44, 569 A.2d 1299, cert. denied, 319 Md. 581, 573 A.2d 1337 (1990); *Nat'l Indemnity Co. v. Continental Ins. Co.*, 61 Md. App. 575, 579, 487 A.2d 1191 (1985).

[HN3] In deciding whether a contract is ambiguous, the trial court must analyze the language of the contract, based on the plain meaning of the words used. *Pacific Indemnity Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 389, 488 A.2d 486 (1985); *Chesapeake Isle, Inc. v. Rolling Hills Development Co.*, 248 Md. 449, 453, 237 A.2d 1 (1968); *Sperling v. Terry*, 214 Md. 367, 369-70, 135 A.2d 309 (1957); *Admiral Builders Sav. & Loan Ass'n v. So. River Landing, Inc.*, 66 Md. App. 124, 128, 502 A.2d 1096 (1986). [HN4] Whether a contract is term or at-will may turn on the intent of the parties. *Staggs*, 61 Md. App. at 388.

[HN5] We review the court's threshold decision of ambiguity based on the "clearly erroneous" standard of Md. Rule 8-131(c). *Admiral Builders*, 66 Md. App. at 128-29. "[A] trial court's conclusion that ambiguity[*11] exists in a writing is an exercise in judgment which should be overturned only if no reasonable suggestion of ambiguity can be entertained." *Id.*

Our review reveals no error in the court's conclusion that the contract was ambiguous. On the one hand, the contract provided for the right to cancel after nine months, implying that the right to cancel before nine months was not reserved. Indeed, Massengill does not dispute that Shapiro had indicated a keen desire that his employment last no less than one year, with at least 60 days notice prior to termination, in order to allow him adequate time to find other employment. Conversely, the contract indicates that the parties merely expected "the term of [employment] to go for at least one year," predicated on the assumption that "both continue working as [they] anticipated." The precatory language, such as "I expect" and "assuming," undermines Shapiro's assertion that the contract was for a fixed term.

[HN6] Ambiguity also derives from a review of the contract as a whole. Arguably, it anticipated that Shapiro's employment could continue for an indefinite duration. In that spirit, it addressed raises, profit sharing, and eventual[*12] partnership. See Hrehorovich, 93 Md. App. at 790 (a contract not specifying a term is terminable at will). Moreover, the nature of the employment (the practice of law) does not, by itself, suggest a fixed term. Compare, however, Sperling, 214 Md. at 369-70 (implicitly, from the language and the circumstances, contract to build a single residential dwelling was a contract for a fixed term, particularly because the employee was not in the building business).

We conclude that the court was not clearly erroneous in ascribing ambiguity to the agreement. As a result, the court did not err in submitting to the jury the question of whether the contract was at-will or for a fixed term. n3

-----Footnotes-----

n3 In this regard, the court instructed the jury that, "In the event of an ambiguity or uncertainty a contract of employment prepared by the employer must be construed against the employer."

-----End Footnotes-----

B. Jury Instruction On Termination For Cause

We do not know how the jury resolved the important question of whether[*13] the contract was for a fixed term or at will; the verdict sheet did not direct the jury to answer that question. n4 In order to address appellant's next complaint, we shall assume, arguendo, that the jury found that the contract was for a fixed term. n5 As we have noted, if the agreement provided for a specific term of employment, Shapiro could only be terminated during that term for "just cause." Chai Mgmt., 50 Md. App. at 513.

-----Footnotes-----

n4 Neither party requested that the jury return a special verdict pursuant to Md. Rule 2-522(c) and Shapiro did not request that the court ask the jury to clarify its verdict in favor of appellees. Nails v. S & R, Inc., 334 Md. 398, 412, 639 A.2d 660 (1994) (judge can ask the jury to clarify or amend its initial general verdict until the jury has been discharged).

n5 If the jury had concluded that the contract was at will, then the issue concerning the contested jury instruction obviously would be moot.

-----End Footnotes-----

The court instructed the jury, in pertinent part, as follows:

A material[*14] breach [of contract] by one party relieves the other party from the duty of performance. A breach is material if it affects the purpose of the contract in an important or vital way.

An employer may terminate an employee for suspected criminal activity or a sincere belief that the employee is untrustworthy.

An employment contract for a stated term may only be terminated before the end of the term for cause. . . .

If the employer claims he was fraudulently induced to enter the contract he must establish the fraud by clear and convincing evidence. . . .

An employment contract may not be terminated for failure to disclose facts in applying for employment unless one, the facts not disclosed establish that the employee was unqualified or unfit for the job applied for and disclosure of such facts was specifically requested by the employer; and two, the employee deliberately withheld these facts to create a false impression about his qualifications and fitness for the position.

No sinister or adverse inference should be or can be drawn from the fact that Mr. Shapiro accepted CONTEL's offer to provide an attorney for him for the Army's interview[*15] nor should a sinister or adverse inference be drawn from the fact that any person chooses to be represented by an attorney whether they are a witness in an investigation or for any other purpose.

* * *

Contract provisions do not eliminate the basic principle that gives an employer the right to discharge for good cause even though such right is not stated in the agreement.

When an employer because of an employee's wrongful conduct can no longer place the necessary faith and trust in an employee he is entitled to dismiss such employee without penalty. This is especially true where the employee has a responsible position where faith and trust are required. The employer must act in good faith.

. . . Fraudulent inducement means that a party has been led to enter into an agreement to his or her disadvantage as a result of deceit.

Deceit means that the person entered the agreement based on the other party's wilful non-disclosure or false representation of a material fact which the other party had a duty to disclose.

* * *

A fact not disclosed does not entitle a person to cancel a contract on the grounds of non-disclosure of the[*16] fact unless the fact was vital to the performance of the contract, was known to the party who did not disclose the fact and was not obtainable by the other party.

Further, a contract may not be canceled by one party because of undisclosed possibilities which were not susceptible of exact knowledge at the time of the negotiations.

If a misrepresentation or non-disclosure is innocent, honest or unintentional it may not be relied on to ignore the express terms of a written contract.

(Emphasis added).

Shapiro excepted to the court's instructions. In the event the jury were to find that the contract was for a fixed term, he asked the court to amplify its instructions on "cause," by providing the following instruction:

An employment contract for a stated term may only be terminated before the end of the term for cause. An employment contract cannot be terminated for cause because of misconduct of the employee, unless the misconduct is actually injurious to the employer's business, or is gross or evil. Mere suspicion or belief that an employee engaged in misconduct is not sufficient grounds for termination of an employment contract; rather, the employer[*17] must prove by a preponderance of the evidence that the employee in fact engaged in misconduct, and that the misconduct constituted sufficient cause to terminate the contract.

(Emphasis added). The court refused to give Shapiro's proposed instruction.

During deliberations, the jury sent a note to the court, asking, "If this is a term contract does the law say that the employer can breach a contract on the basis of mistrust even if evidence may prove the seeming deceit was not deliberate?" After consulting with counsel, the court wrote back, "Yes, under certain circumstances. You must rely on the evidence presented and the law as I have instructed you." n6 Shapiro excepted to this instruction and again requested that the court give his proposed instruction.

-----Footnotes-----

n6 The court had previously informed the jury that the instructions were being videotaped, and that the jury was free to review this videotape during their deliberations.

-----End Footnotes-----

Based primarily on *Dorrance v. Hoopes*, 122 Md. 344, 90 A. 92 (1914), Shapiro argues[*18] here, as he did below, that "just cause" does not include acts of "misconduct," such as the failure to disclose information the employer considers material, unless the act "is actually injurious to the employer's business, or is gross or evil." Appellant relies on the following passage from *Dorrance* to support his position:

"Mere misconduct, not amounting to insubordination, or involving moral turpitude, or exercising a bad influence over other servants, or producing injury to the master's business, or members of the master's family, is not enough to warrant the discharge of a servant. The misconduct must be gross, or such as is incompatible with the relation, pernicious in its influence, or injurious to the master's business; and, in determining the question, reference must always be had to the business or employment in which it arose, and the relative social condition of the master and servant. What might be regarded as improper or insolent in a servant toward one master, might not be so regarded toward another."

122 Md. at 350 (quoting *Wood on Master and Servant* § 109, at 210; emphasis ours). See also *Bright v. Ganas*, 171 Md. 493, 503-04, 189 A. 427 (1937)[*19] (quoting same language).

We believe appellant's reliance on the passage quoted from *Dorrance* is misplaced. In *Dorrance*, the employer hired the employee for a fixed term to supervise farm hands, as well as to provide specified services on the farm. Later, the employer and the employee, in the presence of other employees, argued over who would pay the cost of repairs to certain equipment provided by the employee and his father. During the argument, the employer all but accused the employee's father of lying, and the employee responded angrily that he was inclined to believe his father over his employer. The employer then fired the employee, alleging insubordination. Affirming the jury verdict for the employee, the Court held that the employer had provoked the employee's conduct sufficiently to support the jury's verdict. *Id.* at 353.

Dorrance focused on insubordination; the employer was angry because the employee effectively called him a liar in front of the other employees. In that context, the Court concluded that just cause required either actual injury or gross or evil misconduct. Nothing in the Court's opinion in *Dorrance* mandates that every claim of[*20] "just cause" requires actual injury or gross misconduct. Moreover, and more to the point here, the Court specifically recognized that just

cause may be based on "incompatibility" in the employment relationship and that the nature of the business or employment is also an important consideration.

The concept of "just cause" does not lend itself to a mathematically precise definition. Indeed, "there is no single definition of what constitutes good cause for discharge." STANLEY MAZEROFF, MARYLAND EMPLOYMENT LAW § 3.3(A), at 189 (1990). Rather, whether conduct amounts to "just cause" necessarily varies with the nature of the particular employment. Simply put, what satisfies just cause in the context of one kind of employment may not rise to just cause in another employment situation. Similarly, misconduct that renders an employee "incompatible" with the employer may constitute "just cause," even if the action is not, as Shapiro would require, "actually injurious to the employer's business, or . . . gross or evil."

[HN7] Under Md. Rule 2-520(b), the court must instruct the jury upon the law, either by giving particular instructions offered by the parties, by crafting its own, or by combining[*21] elements of both. A party is entitled to have his or her theory of the case presented to the jury, provided that the theory is legally and factually supported. *Levine v. Rendler*, 272 Md. 1, 320 A.2d 258 (1974); see also, *Schaefer v. Publix Parking*, 226 Md. 150, 152-53, 172 A.2d 508 (1961) ("There can be little doubt that all parties to a law suit are entitled to have the jury properly instructed upon their theories of the case."). The court, however, need not give any particular requested instruction if the matter is "fairly covered by instructions actually given," Rule 2-520(b), so long as the instructions correctly state the law. *Sergeant Co. v. Pickett*, 285 Md. 186, 193, 401 A.2d 651 (1979). If the instructions constitute a clear and accurate expression of the law, we will not reverse merely because of a failure in form. *Wilhelm v. State Traffic Safety Comm'n*, 230 Md. 91, 185 A.2d 715 (1962); see also *Blaw-Knox Constr. Equip. Co. v. Morris*, 88 Md. App. 655, 666-67 (1991) (trial court has wide discretion as to the form of instructions).

We conclude that the court's instructions satisfied the requisite criteria. The jury was properly and adequately instructed that an employer may not terminate for cause because[*22] of an "honest or unintentional" non-disclosure. In addition, the court did not err in advising the jury that an employer may discharge a term employee, who is in a position requiring trust, based on the employer's reasonable belief that the employee is untrustworthy.

[HN8]

"When an employer, because of an employee's wrongful conduct, can no longer place the necessary faith and trust in an employee, he is entitled to dismiss such employee without penalty. This is especially true where the employee has a responsible position where faith and trust are required."

Chai Mgmt., 50 Md. App. at 512 (quoting *Barisa v. Charitable Research Foundation, Inc.*, 287 A.2d 679, 682 (Del. Super. Ct.), *aff'd* 299 A.2d 430 (Del. 1972)); cf. *Townsend v. L.W.M. Mgmt., Inc.*, 64 Md. App. 55, 69-70, cert. denied, 304 Md. 300 (1985) (employee discharged because results of polygraph test indicated he was a thief; discharge was for cause and was not wrongful).

We are mindful that this dispute involves two attorneys and, in the context of the legal profession, the court's instruction as to trustworthiness was particularly appropriate. The legal profession is grounded, after all, [*23] on integrity. Moreover, perceptions of integrity can be as important as the reality, good judgment is vital, and there is little room for a stain on one's reputation for honesty. To an employer maintaining a practice of law, personal characteristics involving candor, forthrightness, trustworthiness, honesty, judgment, and integrity may well constitute essential job requirements. Ensuring a high standard for personal character is especially important to legal employers because, when associates act dishonorably or dishonestly, the misconduct may discredit the entire firm.

In addition, character traits are certainly relevant to compatibility. An attorney/employer might reasonably use the degree to which a candidate for employment discloses embarrassing or damaging information as a yardstick of personal characteristics that are understandably important to the employer with whom the employee will be working and upon whom the employer will inevitably rely. Certainly, such traits--like compatibility itself--are inherently subjective; what one person thinks is good judgment or moral character or finds compatible may seem like poor judgment, questionable character, or incompatibility to another. [*24] Thus, one employer might reasonably want to know the extent to which an employee is connected to a criminal investigation, even if the employee is innocent, while another might not care at all. Nonetheless, it is not patently unreasonable for a prospective legal employer to expect disclosure of potentially embarrassing or unpleasant facts, even without asking for such information. Nor is it unreasonable for the employer to find it unacceptable that the employee was not forthcoming. Similarly, the attorney-employer of another attorney could

reasonably find nondisclosure indicative of poor judgment, untrustworthiness, and, ultimately, incompatibility, even if such nondisclosure would not constitute "just cause" in another employment context.

We emphasize that the issue is not whether Shapiro's conduct while employed by Contel--the extent of his involvement in the matter under investigation by the Army--could itself constitute cause for his dismissal. The question is whether the fact of the investigation, centering on a transaction in which Shapiro was at least peripherally involved, was a matter about which an attorney reasonably might want to be apprised in deciding whether to employ[*25] Shapiro in the first instance. If so, non-disclosure of that information--even if, in retrospect, it turns out to be wholly noninculpatory--may justifiably lead the attorney to question the employee's judgment and trustworthiness.

We cannot say, as a matter of law, that Shapiro's failure to disclose the investigation was unethical, immoral, deceptive, dishonest, or demonstrative of poor judgment, as Massengill claims. Neither can we say that Shapiro's failure to disclose did not amount to just cause from the employer's perspective. Under the circumstances of this case, it was squarely the jury's province to resolve whether, in the employment context of the legal profession, Shapiro's nondisclosure constituted good cause. The jury determined that it was, and we perceive no error.

II. Wrongful Discharge

Shapiro contends that, even if he was an at-will employee, his termination constituted an abusive or wrongful discharge under *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) and its progeny. As we have observed, with few exceptions, at-will employment is terminable by either party, at any time, for any reason whatsoever. *Adler*, 291 Md. at 35 (citing *St. Comm'n* [*26] on *Human Rel. v. Amecom Div.*, 278 Md. 120, 360 A.2d 1 (1976), *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941), and *W., B. & A.R.R. Co. v. Moss*, 127 Md. 12 (1915)); *Denro*, 91 Md. App. at 829. [HN9] "The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time." *Adler*, 291 Md. at 35. See also *Suburban Hosp. v. Dwiggin*, 324 Md. 294, 303, 596 A.2d 1069 (1991); *Hrehorovich v. Harbor Hospital*, 93 Md. App. at 784-85; *Castiglione*, 69 Md. App. at 338. Nonetheless, the Court in *Adler* recognized a "narrow exception" to that rule, when the discharge contravenes a clear mandate of public policy. *Adler*, 291 Md. at 35. See also *Ewing v. Koppers Co., Inc.*, 312 Md. 45, 49, 537 A.2d 1173 (1988) (tort is also available to contractual employees); *Brandon v. Molesworth*, ___ Md. App. ___, No. 791, Slip Op. at 10-18 (Sept. Term 1994, filed Mar. 28, 1995) (discussion of wrongful discharge); *Denro*, 91 Md. App. at 829-30 (discussing definition of clear mandate of public policy); *Townsend v. L.W.M. Mgmt., Inc.*, 64 Md. App. 55, 60-61 (1985) (same).

[HN10] The tort of wrongful or abusive discharge[*27] "is defined as the willful termination of employment by the employer because of the employee's alleged failure to perform in accordance with the employer's expectations and the termination is contrary to a clear mandate of public policy." *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642, 652, 547 A.2d 1105, cert. denied, 314 Md. 458 (1988). Specifically, in order to state a claim for wrongful discharge, the employee must demonstrate: (1) that the employee was discharged; (2) that the dismissal violated some clear mandate of public policy; and (3) that there is a nexus between the defendant and the decision to fire the employee. *Leese v. Baltimore Co.*, 64 Md. App. 442, 468, 497 A.2d 159, cert. denied, 305 Md. 106, 501 A.2d 845 (1985). To prevail, however, the employee must demonstrate the policy in question with clarity, specificity, and authority: "'Recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of the case,' a practice which should be employed sparingly, if at all." *Lee v. Denro*, 91 Md. App. at 830 (quoting *Adler*, 291 Md. at 45).

Shapiro contends that his discharge contravened two clear mandates[*28] of public policy: a policy favoring compliance with criminal investigations and a policy protecting the privacy of those who are subject to criminal investigations. The trial court instructed the jury that, for Shapiro to prevail on his claim of wrongful discharge, the jury had to find that Massengill discharged him "because of him going and testifying or being interviewed by [a government] agent." As to the second policy, appellant argues that he had an affirmative obligation not to disclose to a prospective employer that Contel was under criminal investigation. Nevertheless, the court refused to give appellant's proposed instruction:

There is no legal or ethical requirement or duty that an employee disclose to prospective employers that his current employer is under investigation, and there is no legal or ethical requirement or duty that job applicants disclose to prospective employers that they have been or may be a witness in such investigations.

The government conducts criminal investigations not only to determine if the law has been violated, but also to assure itself that the law has not been violated.

In fact, because disclosure of even the existence[*29] of a criminal investigation by law enforcement agencies or a grand jury can be very damaging to a company's or a person's reputation without any determination of guilt of such company or person, law enforcement agencies and the courts regard criminal investigations to be private, confidential and not subject to disclosure to third persons without a legitimate law enforcement need.

Consequently, there is no legal or ethical duty upon an applicant for a job to disclose the existence of an investigation of his employer to prospective employers. Further, the employee has a duty of confidentiality to his current or past employer, and may not be refused employment or retaliated against for protecting his employer's right to privacy by not disclosing the existence of an investigation.

(Underline in original; italics added). n7

-----Footnotes-----

n7 Appellees contend that, as a threshold matter, the question of whether "it was against public policy for an employer to compel an employee to disclose information concerning a former employer" was not preserved for our review because the language of the jury instructions requested do not raise it. See Md. Rule 8-131(a). Based upon the italicized portion of this jury instruction request, and Shapiro's timely exceptions to the court's refusals to give the instruction, we see no merit to Massengill's contention that the issue was not preserved.

-----End Footnotes-----

[*30]

Shapiro essentially contends that, whenever an employer discharges an employee for refusing to violate a third party's privacy, such discharge is a violation of the clear mandate of public policy articulated in *Kessler v. Equity Mgmt., Inc.*, 82 Md. App. 577, 572 A.2d 1144, (1990). n8 Relying on *Kessler*, Shapiro argues that, if we do not find a clear mandate of public policy here, we will implicitly impose a duty upon all prospective employees to disclose the existence of any pending criminal investigation of former employers, subjecting all concerned to the risk of being tarred "with the brush of guilty by association." At least implicitly, the duty to disclose would extend to purely personal information. We do not agree that the important policy articulated in *Kessler* was in any way implicated by Shapiro's discharge.

-----Footnotes-----

n8 In addition, Shapiro relies on cases from federal courts in which agents of the federal government were asked to disclose the fact that certain individuals and companies were under criminal investigation; the courts routinely held that such disclosures would violate the right of privacy held by the subjects of criminal investigations. See, e.g., *U.S. Dep't of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 767, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989); *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 681 n.6, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958); *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1216 (9th Cir. 1989); *Stern v. Fed. Bureau of Investigation*, 737 F.2d 84, 91-92 (D.C. Cir. 1984).

Unassailably, subjects of criminal investigations generally have an interest in ensuring nondisclosure of the fact that they are being investigated. Nevertheless, these cases are all inapposite, for essentially the same reason: They stand for the proposition that the government, as the party bringing the investigation, has a duty not to disclose such information, and the First Amendment does not give the press the right to force the government to disclose it. To a similar effect is Md. Code Ann., State Gov't Art. § 10-618(f) (1993), which lists the permissible reasons for denying public access to criminal investigation records. But these cases and statutory sections do not support Shapiro's contention that anyone

having information relating to a pending criminal investigation has a duty not to disclose the identity of the target of that investigation.

-----End Footnotes-----

[*31]

In Kessler, the landlord/employer discharged an employee for refusing to enter illegally the apartments of defaulting tenants, and to rummage through their personal papers for information useful for debt collection. In holding that the discharge constituted a violation of a clear mandate of public policy, we noted both statutory and constitutional protections guarding against the invasions of privacy that the plaintiff was instructed to commit. We focused, too, on the "treasured right" of privacy in one's home, Kessler, 82 Md. App. at 599, a sacrosanct right well protected by the constitution. We also said:

We need not decide whether discharging an at-will employee for refusing to commit any act that might technically be tortious would be "contrary to a clear mandate of public policy."

* * *

Had appellant carried out her instructions to invade tenants' constitutionally protected rights of privacy by snooping through their private papers, she would have been subject to civil liability. As Judge Eldridge, writing for the Court of Appeals in Widgeon v. Eastern Shore Hospital Center, 300 Md. 520, 479 A.2d 921 (1984), explicated, violations[*32] of state or federal constitutional rights are actionable wrongs. Indeed, . . . a violation of those rights could be remedied by an action at law for damages.

82 Md. App. at 599-89 (*italics in original; underlining added*).

Clearly, the general rule applicable to at-will employment is subject to a public policy exception. The challenge is in identifying "what constitutes a 'public policy,' the violation of which amounts to a cause of action" for wrongful discharge. Denro, 91 Md. App. at 829. While "jurists to this day have been unable to fashion a truly workable definition of public policy," Md.-Nat'l Cap. P & P v. Washington Nat'l Arena, 282 Md. 588, 605-06, 386 A.2d 1216 (1978), we acknowledge that

"public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions be the public policy of another."

Townsend, 64 Md. App. at 61-62 (quoting Patton v. United, 281 U.S. 276, 306, 74 L. Ed. 854, 50 S. Ct. 253 (1930)).

As[*33] in Denro, "this case presents the 'familiar common-law problem of deciding where and how to draw the line between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not.'" Id. at 828 (citing Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385, 387 (Conn. 1980)). The line here must be drawn in favor of the employer; we hold that the court did not err in declining to recognize, as a matter of public policy, that Shapiro had a duty not to disclose the Contel investigation to appellees, or that his discharge contravened an important public policy to that effect.

In marked contrast to Kessler, Shapiro has not identified any statutory or constitutional basis for his claim of a clear mandate of public policy. Nor has Shapiro advanced any basis upon which he could have been held civilly or criminally liable for disclosure of the Contel investigation: Shapiro did not have a written employment contract with Contel; Contel did not impose an employment restriction (other than "general common sense") barring his disclosure of information concerning Contel; and the government did not require [*34]Shapiro to maintain the confidentiality of the Contel investigation. Absent some clear mandate, under which Shapiro actually could be held responsible for a breach of public policy, we do not believe the "policy" of protecting the privacy of parties under criminal investigation constitutes a sufficiently clear mandate to support Shapiro's wrongful discharge claim.

Moreover, Shapiro's own conduct undercut his purported concern for Contel's privacy. In the face of the impending government interview, Shapiro immediately divulged the fact of the investigation to Massengill, without taking any steps to ensure Contel's privacy. Shapiro also characterized the matter as "insignificant."

The question is not whether discharging Shapiro for his failure to disclose was fair, justified, sensible, reasonable, or appropriate. Rather, the question is whether it was wrongful, i.e., whether it violated a clear mandate of public policy. Absent that type of violation, employers can discharge at-will employees for no reason or even for a bad reason.

What appellant overlooks . . . is the fact that mere termination of employment does not give rise to a cause of action for [wrongful] [*35] discharge. [If appellant] was an 'at-will' employee, appellee had an absolute right to fire [him] for no reason or for almost any reason without incurring any liability for doing so.

Beery v. Md. Medical Laboratory, Inc., 89 Md. App. 81, 94, 597 A.2d 516 (1991), cert. denied, 325 Md. 329, 600 A.2d 850 (1992) (emphasis in original). See also Lee v. Denro, 91 Md. App. at 836 ("The fact that the employer does not have a good reason for the employee's discharge does not, in the absence of a clear violation of public policy, render the discharge 'abusive' or 'wrongful.'").

What we said in Beery is equally apt here:

Had [the employee] been guilty of the alleged misconduct, it would have been entirely proper and appropriate for the employer to fire [him]. Firing [him] on the basis of . . . unsubstantiated allegations, without proof and, indeed, without fully investigating the matter, may very well have been improper--even foolish--but can hardly be said to contravene any clear mandate of public policy.

89 Md. App. at 94-95.

III. Defamation

At a firm-wide meeting, held soon after Shapiro's termination, Massengill explained why he had discharged[*36] Shapiro so soon after hiring him. According to the testimony of Massengill's employees, Massengill said, among other things, that Shapiro had been the "subject" of an investigation, that he might be its "target," that Shapiro could be indicted, that as a manager he would be blamed as a matter of course for any wrongdoing discovered by the inquiry, and that they all might soon be reading about it in the newspapers. Moreover, Massengill alleged that Shapiro, aware that he was being investigated, intentionally did not so inform Massengill during the employment negotiations.

In addition, Massengill contested Shapiro's application for unemployment insurance benefits, without speaking to Radoff and notwithstanding the exculpatory letter sent by the Army's Special Agent. In the statement Massengill sent to DEED, he asserted the following:

On April 24, 1991 Mr. Shapiro advised me for the first time that he was going to be questioned in a criminal investigation being conducted by the federal government. He told me that he had been the contracts manager on the contract claim being investigated; that his former employer had retained a criminal law attorney to represent him; and, that[*37] he had been aware of this problem, and the investigation, both during our negotiations and at the time he came into my employ.

Mr. Shapiro admitted to me that he could be indicted. He is the one who submitted the claim on behalf of his employer as contracts manager. Investigations of possible fraud by government contractors is a major focus at this time.

Mr. Shapiro and I had discussed starting a business side to the practice which would also involve government contracting. . . . Yet, he never told me that he was involved in a criminal investigation at any time during our negotiations nor prior to coming into my office. As an attorney, he had an ethical responsibility to tell me.

* * *

Had Mr. Shapiro advised me about his problems, he would never have been hired. I believe he knew that. Mr. Shapiro, in my view, was ethically obligated to advise me. He did not do so and in fact told me he felt he had no duty to disclose something to me which went to the very core, ethically and morally, of our plans. I decided that I could no longer trust his ethics nor his judgment.

(Emphasis added).

At the close of the evidentiary[*38] phase of the trial, the court ruled that Massengill's comments to his employees could not support an action for defamation, on the grounds that "there was absolutely no, zero, zero production of any evidence whatsoever that there was anything said by Mr. Massengill that could in any way have been construed as a reflection on the plaintiff." In contrast, the court determined that the letter to DEED could be considered defamatory, and so allowed the jury to consider it. The court said:

I am instructing you now that as a matter of law that the only defamation that you will be able to consider in this case is that if any which you find in a letter directed by Mr. Massengill to the unemployment commission.

I am instructing you specifically that you are not to consider any verbal, anything that he said to anybody and there were a number of employees, I believe, involved in this defamation. Okay, so that is not to be considered by you.

On appeal, Shapiro contends that the court erred in failing to rule as a matter of law that Massengill's statements, including both the statement to DEED and the verbal communications to Shapiro's co-workers, were defamatory per se. [*39]Necessarily subsumed within this contention is the question of whether the court correctly analyzed the nature of the various statements. We are of the view that the alleged statements to the employees were defamatory per se and the court erred by refusing to allow the jury to consider those statements. Moreover, had the jury considered all of Massengill's remarks, both verbal and written, the jury might have found for Shapiro. We explain.

[HN11] In a case involving a plaintiff who is not a public figure, a prima facie case of defamation requires proof of the following elements:

(1) that the defendant made a defamatory communication--i.e., that he communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.

Kairys v. Douglas Stereo Inc., 83 Md. App. 667, 678, 577 A.2d 386 (1990) (citing Hearst Corp. v. Hughes, 297 Md. 112, 466 A.2d 486 (1983) and Gooch v. Md. Mechanical Systems, Inc., 81 Md. App. 376, 567 A.2d 954, cert. denied, [*40] 319 Md. 484, 573 A.2d 807 (1990)). [HN12] "Fault," for the purposes of the prima facie case, may be based either on negligence or constitutional malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); Batson v. Shiflett, 325 Md. 684, 728, 602 A.2d 1191 (1992); Hearst Corp., 297 at 122 (citing Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976)). See also Restatement (2d) Torts § 580(B) (1975) (fault standard for defamation of a private person). Constitutional malice, which is sometimes referred to as actual malice, Batson, 325 Md. at 728, is established where the plaintiff shows, by clear and convincing evidence, that the defendant published the statement in issue either with reckless disregard for its truth or with actual knowledge of its falsity. Id.

[HN13] Maryland continues to recognize the distinction between defamation per se and defamation per quod. Hearst Corp., 297 Md. at 125 (citing IBEW, Local 1805 v. Mayo, 281 Md. 475, 379 A.2d 1223 (1977)); Gooch, 81 Md. App. at 393. The distinction between per se and per quod was explained in Metromedia, Inc. v. Hillman, 285 Md. 161, 400 A.2d 1117 (1979):

[HN14]

"In the case of words or conduct actionable per se their injurious character is a self-evident[*41] fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable only per quod, the injurious effect must be established by allegations and proof of special damage and in such

cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage."

Id. at 163-64 (quoting *M & S Furniture Sales Co. v. Edward J. DeBartolo Corp.*, 249 Md. 540, 241 A.2d 126 (1968)).

[HN15] The determination of whether an alleged defamatory statement is per se or per quod is a matter of law. *Gooch*, 81 Md. App. at 391 n.8. If the statement is per quod, then the jury must decide whether, by reason of extrinsic circumstances, the statement carries a defamatory meaning. *Helinski v. Rosenberg*, 90 Md. App. 158, 165, 600 A.2d 882, rev'd on other grounds, 328 Md. 664, 616 A.2d 866 (1992), cert. denied, ___ U.S. ___, 113 S. Ct. 3041 (1993). See also *Gen'l Motors Corp. v. Piskor*, 27 Md. App. 95, 117, 340 A.2d 767, (1975), rev'd on other grounds, 277 Md. 165, 352 A.2d 810, (1976).

[HN16] The significance of whether the defamation is per se or per quod turns on the degree of fault; even if the statement is actionable per se, the plaintiff must prove actual damages when the defendant was merely negligent in making the false statement. *Hearst Corp.*, 297 Md. at 122; *Metromedia*, 285 Md. at 172; *Jacron*, 276 Md. at 590. But where a plaintiff can establish constitutional malice, "a presumption of harm to reputation still arises from the publication of words actionable per se. A trier of fact is not constitutionally barred from awarding damages based on that presumption in a constitutional malice case." *Hanlon v. Davis*, 76 Md. App. 339, 356, 545 A.2d 72 (1988) (citing *Hearst*, 297 Md. at 125-26)). Therefore, if a plaintiff can demonstrate constitutional malice, the jury may award general damages for false words that are actionable per se, even in the absence of proof of harm. *Hearst Corp.*, 297 Md. at 125-26; *Laws v. Thompson*, 78 Md. App. 665, 685, 554 A.2d 1264, cert. denied, 316 Md. 428, 559 A.2d 791 (1989); *Hanlon*, 76 Md. App. at 355 n.4, 356-57.

-----Footnotes-----

n9 In *Gooch*, 81 Md. App. at 392 n.9, we said that "'Actionable per se' is another term of art casually mentioned in defamation law which carries precisely the same meaning as defamation per se."

-----End Footnotes-----

[*43]

In essence, Shapiro's defamation claim presents the flip side of Massengill's claim that he had cause to fire Shapiro. As we have observed, Massengill's decision to fire Shapiro was at least partly grounded on his concern that the firm's reputation for honesty might be tainted by Shapiro's connection to the Contel investigation. In much the same way, Shapiro claims his reputation for integrity is of paramount importance to him professionally, and he was falsely denigrated by Massengill.

Massengill allegedly told his employees that Shapiro had been the "subject" and the "target" of a criminal investigation and that Shapiro had admitted that he could be indicted; Massengill strongly implied that Shapiro had intentionally concealed this damaging information. Allegations that Shapiro was evasive, secretive, dishonest, dishonorable, and perhaps even a criminal--if the jury finds that those statements were made and were, indeed, false--clearly "impute to [Shapiro] some incapacity or lack of due qualification," *Foley*, 188 Md. at 284, and "would disqualify him or render him less fit properly to fulfill the duties incident" to the practice of law. *Kilgour v. Evening Star Co.*, 96 Md. 16, 23, 53 A. 716 (1902).

As we said in *Leese v. Baltimore Co.*,

[HN17]

It is defamatory "to utter any slander or false tale of another . . . which may impair or hurt his trade or livelihood." 3 W. Blackstone, *Commentaries on the Laws of England* 123 (special ed. 1983). Thus, a statement "that adversely affects [an employee's] fitness for the proper conduct of his business . . . [is] actionable per se at common law." *Hearst Corp. v. Hughes*, 297 Md. 112, 118, 466 A.2d 486 (1983).

This is not to imply, however, that every negative evaluation of an employee's performance is potentially defamatory. Rather, "the words must go so far as to impute to him some incapacity or lack of due qualification to fill the position."

Foley v. Hoffman, 188 Md. 273, 284, 52 A.2d 476 (1947) [other citations omitted]. In other words, the defamatory statement must be such that "if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed." Kilgour v. Evening Star Co., 96 Md. 16, 23, 53 A. 716 (1902).

64 Md. App. at 473-74 (italics added).

Therefore, the trial court's categorical determination[*45] that Massengill's oral statements "could [not] in any way have been construed as a [defamatory] reflection on the plaintiff" was clearly erroneous. The court erred in refusing to allow the jury to consider the statements.

We further conclude that the oral statements to co-workers were defamatory per se. n10 As the Court said in Kilgour v. Evening Star Newspaper Co.,

-----Footnotes-----

n10 The circuit court believed the letter to be at most defamatory per quod.

-----End Footnotes-----

"Words spoken of a person in his office, trade, profession, business or means of getting a livelihood, which tend to expose him to the hazard of losing his office, or which charge him with fraud, indirect dealings or incapacity and thereby tend to injure him in his trade, profession or business, are actionable without proof of special damage, even though such words if spoken or written of an ordinary person, might not be actionable per se."

96 Md. at 23-24 (citations omitted). See also FOWLER V. HARPER ET AL., 2 THE LAW OF TORTS § 5.12, [*46] at 104 (2d ed. 1986) ("It is actionable [per se] to impute professional dishonesty to a lawyer or to call a lawyer a quack or a shyster or a crook." (footnotes omitted)).

Analysis of the letter to DEED makes clear that it, too, was defamatory per se. The trial court analyzed the contents, sentence by sentence, considering each line in a vacuum. For example, the court found the sentence, "Mr. Shapiro admitted to me that he could be indicted," as unobjectionable because indictment, by itself, means nothing. Likewise, the court saw the sentence, "He is the one who submitted the claim on behalf of his employer as contracts manager," as entirely harmless. Finally, the court was untroubled by the sentence, "Investigations of possible fraud by government contractors is a major focus at this time," because it did not name Shapiro. But the words cannot be read in isolation. When read as a whole, the clear implication is that Shapiro had believed he was likely to be indicted for his own act of fraud upon the government, and deliberately concealed that information from Massengill.

Later in the letter, Massengill accused Shapiro of outright deceit:

He never told me that he was involved[*47] in a criminal investigation at any time during our negotiations nor prior to coming into my office. As an attorney, he had an ethical responsibility to tell me. . . . Mr. Shapiro, in my view, was ethically obligated to advise me. He did not do so and in fact told me he felt he had no duty to disclose something to me which went to the very core, ethically and morally, of our plans. I decided that I could no longer trust his ethics nor [sic] his judgment.

The reader of the letter does not have to refer to any outside facts to understand the implication that Shapiro's lack of ethics, and his "involvement" in a criminal investigation, rendered him unfit to be an attorney. Accordingly, Massengill's statements to DEED were defamatory per se.

Based on the foregoing, we believe it was for the jury to decide the following: (1) whether Massengill made the alleged statements; (2) whether the statements were false; (3) the degree of Massengill's scienter or fault; and (4) whether Massengill abused any qualified privilege that his words enjoyed. n11 The trial court erred in refusing to allow the jury to consider both the oral and written statements. Although the DEED letter was submitted[*48] to the jury, we

cannot consider the letter and the oral statements independently; they collectively bear on questions of fault, privilege, and damages. Accordingly, as to the defamation claim, we must reverse and remand for a new trial.

-----Footnotes-----

n11 We note that the letter to DEED was subject to a qualified privilege, by statute. Md. Code Ann., Lab. & Emp't Art., § 8-105 (1992). See also *Gay v. William Hill Manor, Inc.*, 74 Md. App. 51, 56, 536 A.2d 690 (1988) (predecessor statute). The oral communications to employees may also have been protected by the common law privilege extending to communications between an employer and an employee. See, e.g., *McDermott v. Hughley*, 317 Md. 12, 28-29, 561 A.2d 1038 (1989); *Exxon Corp.*, 67 Md. App. at 421 (citing cases); *Happy 40, Inc. v. Miller*, 63 Md. App. 24, 35, 491 A.2d 1210, cert. denied, 304 Md. 299 (1985) (same).

Where words enjoy a qualified privilege, the privilege defeats an action for defamation. *Jacron*, 276 Md at 598. The question of whether a defamatory communication enjoys a qualified privilege is one of law for the court. *Exxon Corp. v. Schoene*, 67 Md. App. 412, 421, 508 A.2d 142 (1986) (citing *Jacron*, 276 Md. at 600)).

In any event, a qualified privilege may be lost if the plaintiff can establish that the defendant acted with constitutional malice, *Marchesi v. Franchino*, 283 Md. 131, 139, 387 A.2d 1129 (1978), or that the defendant's communication exceeded the scope of the privilege, *McDermott*, 317 Md. at 29-30. Generally, the question of whether the defendant had constitutional malice, and whether the privilege thus has been lost, is an issue for the jury to decide. *Exxon Corp.*, 67 Md. App. at 421; *Happy 40*, 63 Md. App. at 34. Massengill's unwillingness to call Radoff to verify Shapiro's account, and Massengill's persistence in writing to DEED even after he received the letter from the Army exonerating Shapiro of wrongdoing, certainly are relevant to the question of constitutional malice.

-----End Footnotes-----

[*49]

JUDGMENT REVERSED AS TO DEFAMATION CLAIM ONLY AND REMANDED FOR NEW TRIAL;
JUDGMENT OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.

ABRAM H. SHOCKEY vs. JACOB S. MCCAULEY.
[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

101 Md. 461; 61 A. 583; 1905 Md. LEXIS 114

June 20, 1905, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court for Carroll County (JONES, C. J., and THOMAS, J.)

DISPOSITION: Judgment affirmed.

CORE TERMS: pulley, rope, barn, slander, excitement, uttered, provocation, by-standers, hay-fork, actionable, prayer, stole, mitigation, felony, spoken, farm, libel, entitled to recover, provoked, passion, larceny, offer evidence, imputation, slanderous, stepped, chattels, door, fast, punitive damages, heat of passion

HEADNOTES: Slander -- Words Actionable per se -- Punitive Damages -- Presumption of Malice -- Evidence of Provocation in Mitigation of Damages.

It is actionable per se to say of one that "he stole them pulleys."

In an action of slander it is within the discretion of the jury to award punitive damages, when the words are actionable in themselves and there is no evidence rebutting the presumption that they were uttered with malice.

Where the plaintiff was a tenant on defendant's farm, and the defendant said to him, in the presence of others, that he had stolen pulleys and a rope, and there is no proof that the words were uttered with reference to permanent fixtures in the barn, not subject to larceny because a part of the real estate, the trial Court properly refused to instruct the jury that if they find the words were spoken solely with reference to the removal of pulleys and ropes from the defendant's barn, and were not intended by him and were not understood by the by-standers to charge the plaintiff with committing felony, then the plaintiff is not entitled to recover.

The defendant in an action of slander may show in mitigation of damages that the words were uttered in the heat of passion or under excitement provoked by the plaintiff, but evidence of defendant's anger or excitement, not the result of plaintiff's conduct, is not admissible.

COUNSEL: J. Clarence Lane and C. A. Little, for the appellant.

Jas. A. C. Bond and Chas. D. Wagaman (with whom was Frank G. Wagaman on the brief), for the appellee.

JUDGES: The cause was argued before MCSHERRY, C. J., FOWLER, BRISCOE, PAGE, BOYD and SCHMUCKER, JJ.

OPINIONBY: PAGE

OPINION: [**584] [*461] PAGE, J., delivered the opinion of the Court.

This is an action of slander, brought by the appellee against the appellant, for words spoken of the latter by the former.

The words alleged to have been spoken are, "he (meaning [*462] the appellee) stole them pulleys;" "he stole them pulleys and trip rope;" and "he stole the pulleys and rope."

101 Md. 461, *, 61 A. 583, **;
1905 Md. LEXIS 114, ***

There is no inducement showing the connection in which the words were used; nor innuendo or colloquium, set out in the declaration.

The plea was the general issue. Judgment was for the appellee and the defendant has appealed.

There can be no dispute that the words set out in the narr., according to their usual meaning, are actionable per se. Unexplained, they import that the appellee was guilty of larceny. The first prayer of[***2] the appellee was therefore properly granted.

Exception was taken by the appellant to the granting of the appellee's third prayer, by which the jury was instructed that if they found for the appellee they were at liberty in their discretion to award punitive as well as compensatory damages. It is difficult to assign any substantial reason why it should not have been granted. If the words were uttered in the presence of other persons they are actionable per se, and carry with them the legal imputation of malice. *Long v. Eakle*, 4 Md. 454.

There was no evidence tending to rebut this imputation. This Court in *Fresh v. Cutter*, 73 Md. 87, referred to the case of *Padgett v. Sweeting*, 65 Md. 404, where an instruction like the one here was approved. It there said: "Under the conditions in *Padgett's* case the instructions were proper, but would not be in a case when there was evidence which tended to show that the libel was honestly made." *Coffin v. Brown*, 94 Md. 190.

The appellant offered four prayers, of which the first was conceded, and the second, third and fourth were rejected. The second was, that[***3] if the jury find the words were spoken, "solely with reference to the removal of the pulleys and ropes from the defendant's barn, and were not intended by the defendant, and were not understood by the by-standers to charge the plaintiff with committing felony, then the plaintiff is not entitled to recover more than nominal damages." The fourth prayer was that if the jury found that the words were spoken [*463] solely with reference to the pulleys and ropes belonging to the barn, and were not intended by the defendant and not understood by the by-standers to charge the plaintiff with having committed a felony or other crime punishable corporally, the plaintiff was not entitled to recover at all.

The facts of the case as disclosed by the evidence contained in the record, show that the appellee was a tenant of the appellant, and had been notified by the latter to leave the farm in March. On the thirty-first of that month, when the appellee was getting ready to leave the farm on the following day, the appellant and his brother with one other man were at the "farm house, to collect a bill, for ropes, pulleys and hay." The parties had previously had "considerable trouble" and "several[***4] law suits before magistrates." The appellee asked to see the bill and declined to pay until it was shown him, but the appellant refused to permit him to look at it. That the appellant wanted the appellee to step outside, and said if the appellee would not come out he would come in. The appellee told him not to come in and put his foot against the door to prevent him and those with him from coming in, "and said if they come in he would hit them. Defendant stepped up on door and the appellee stepped back and picked up a window blind roll." The appellant then said "don't talk to a fool, come on we will make him pay for it, &c." The appellant did some cursing, and after quarreling started off, saying as he went, in the hearing of the others, "Jake stole them ropes and pulleys," and his brother Samuel said, "Yes, he did." The appellant testified that the bill contained a charge for "ropes and pulleys," belonging to the "hay-fixtures" in the barn. There was also evidence that they were "fast property." There was no explanation as to what was meant by "fast property." There was no proof that the words were uttered [**585] solely with reference to the hay-fork and pulleys, while attached[***5] to the barn, or that anything was said from which the by-standers could or did so understand them. Nor is there anything to show that the bill was read, or that the by-standers knew it included a charge for the hay-fork. [*464] The only fact that seems to point that way, was the remark of his brother Samuel, but as to that also it does not appear that he had reference to the fork that was in the barn. Hay-forks are detachable articles, they are separated from the barn when not in use, by simply unhooking the pulley. If it be conceded that the appellant had special reference to the pulleys and ropes that belonged to this barn, there is nothing to show that the ropes and pulleys at the time they were removed, were affixed to the building, so that it was not possible for the by-standers to know that they were not then the subject of larceny. We do not mean to decide that a hay-fork as ordinarily used, cannot be the subject of larceny; what we do mean to be understood as saying, is, that according to the testimony in this record, the hay-fork and pulleys and ropes must be regarded as goods and chattels and not as fixtures, there being no evidence, to show that they were anything else[***6] than goods and chattels; that being so the words, in this case, must be taken to be actionable per se. Had circumstances been proved, sufficient to show that they were not intended to charge the appellee

101 Md. 461, *, 61 A. 583, **;
1905 Md. LEXIS 114, ***

with a felony, another question would have been presented, than is now before us. *Fawsett v. Clark*, 48 Md. 494-506; *Garrett v. Dickerson*, 19 Md. 418.

The defendant's third prayer is to the effect, that if "the slanderous words were uttered under the influence of passion or excitement or under circumstances of great provocation" such facts could be considered in mitigation of damages, was rejected. The jury was not required to find in addition, that the passion and excitement was produced by the immediate provocation of the appellee. It has frequently been held that the jury may, in estimating damages in cases of slander, take into account the excitement wrongfully provoked by the plaintiff. *Newell on Slander and Libel* (2 ed.), 907; *Thomas v. Fischer*, 71 Ill. 576; *McClintock v. Crick*, 4 Iowa 453; *Moore v. Clay*, 24 Ala. 235.

It seems to be entirely reasonable to permit the[***7] defendant in a suit for slander or libel to offer evidence of provocation created by the improper conduct of the plaintiff; as CHANCELLOR [*465] WALWORTH said in *Maynard v. Beardsley*, 7 Wend. 564, "the law makes allowances for the infirmities of human nature." The weight of authority seems to be, that the defendant may show in mitigation of damages that the words were uttered in heat of passion or under great excitement, whenever such condition has been caused by the wrongful and proximate act of the plaintiff. 18 E. & A. Enc. of Law, 1109.

In *Watts v. Frazer*, 7 Car. & Payne, 369, the defendant was allowed to offer evidence showing provocation, and this Court in *Botelar v. Bell*, 1 Md. 173, referring to that case, said there was a vast deal of good sense in the view, that "a man who indulges in slanderous language towards another, when he has been provoked to it, by a long series of abuse, is less culpable in the eye of the law and of morals, than he, who from a fiendish dislike to his fellow man, or from a spirit of idle gossip, invents slander against his neighbor." But there are no authorities that go so far[***8] as to support the contention that any passion or excitement, or provocation, no matter how or by whom caused, can be given to the jury, and no sound reasons can be assigned for so holding. Certainly passion or provocation created by causes for which the plaintiff is not responsible, should not furnish a mitigation of the grave offense of maliciously slandering the character of another.

Finding no error, the judgment will be affirmed.

Judgment affirmed.

JOHN W. STROMAN, Plaintiff-Appellant, v. COLLETON COUNTY SCHOOL DISTRICT; A. L. SMOAK, JR.,
Superintendent of Education, Colleton County School District; COLLETON COUNTY BOARD OF SCHOOL
TRUSTEES; NATHAN H. KENNEDY, Chairman, Colleton County Board of School Trustees, Defendants-Appellees.
No. 92-1340

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

981 F.2d 152; 1992 U.S. App. LEXIS 31945

October 2, 1992, Argued
December 4, 1992, Decided

SUBSEQUENT HISTORY: As Amended January 26, 1993.

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of South Carolina, at Charleston.
David C. Norton, District Judge. CA-89-1747-2-18.

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant teacher sought review of the decision of the U.S. District Court for the District of South Carolina, which granted summary judgment to appellee school district, school board, and school officials in appellant's action, filed pursuant to 42 U.S.C.S. § 1983, alleging that his discharge was impermissibly based on his exercise of free speech in criticizing appellees' budgetary mismanagement.

OVERVIEW: Appellant school teacher was discharged for circulating a letter to other teachers criticizing appellee school district, school board, and school officials for their budgetary mismanagement and calling for a "sick out" during final exams. Appellant filed an action alleging that he was impermissibly discharged for his exercise of free speech. The district court granted summary judgment to appellees and appellant sought review. The court disagreed with the district court's dissection of appellant's letter in conducting its constitutional analysis, but affirmed the decision. The court held that the proper method was to consider the letter as a single expression and to determine whether, in its entirety, it represented speech protected by U.S. Const. amend. I. Using this test, the court determined that appellant's letter represented protected speech, but that appellant's interest with public concerns was outweighed by appellee's obligation to provide uninterrupted educational services. The court recognized that as a teacher, a citizen did not lose his right to comment on public concerns, but could be expected to elect a method that did not frustrate the provision of education.

OUTCOME: The court affirmed the grant of summary judgment to appellee school district, school board, and school officials in appellant school teacher's action alleging that he was discharged for his exercise of free speech because although appellant's letter criticizing appellees' budgetary mismanagement was protected speech, his interest in public concerns was outweighed by appellees' obligation to provide uninterrupted educational services to children.

CORE TERMS: teacher, First Amendment, school district, sick-out, grievance, matters of public concern, protected speech, motivating, budgetary, sick leave, budget, exam, duty, superintendent, mismanagement, criticizing, circulated, proposing, abandon, public school teacher, public education, summary judgment, public service, encouraging, discharged, fellow, paying, played, matter of public concern, supervision

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN1] A state may not dismiss a public school teacher because of the teacher's exercise of speech protected by U.S. Const. amend. I. Speech by a public school teacher is protected by U.S. Const. amend. I when (1) the teacher speaks as a citizen about matters of public concern and (2) the teacher's interest in exercising free speech is not outweighed by the countervailing interest of the state in providing the public service the teacher was hired to provide. When the accommodation of the teacher's right to comment as a citizen on public issues conflicts with the state's interest in providing a public education, the interests must be balanced to determine which is to prevail.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN2] Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by U.S. Const. amend. I, but are matters more immediately concerned with the self-interest of the speaker as employee.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN3] While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, U.S. Const. amend. I does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Civil Procedure: Jury Trials: Province of Court & Jury

[HN4] Whether speech fairly relates to a public concern or expresses a private grievance or a matter of immediate self-interest must be determined by the content, the form, and the context of the speech. And the issue is one of law, not fact, for the court to decide.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

Evidence: Procedural Considerations: Inferences & Presumptions

[HN5] In determining whether the teacher's discharge from employment was based on an exercise of conduct protected by U.S. Const. amend. I, the teacher has the burden of proving that protected speech played a "substantial" role in the termination decision or was "a motivating factor." The employer may nevertheless rebut the showing by proof that it would have discharged the plaintiff even in the absence of the protected conduct. The test thus becomes one of whether the teacher would have been retained or rehired "but for" his exercise of speech protected by U.S. Const. amend. I.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN6] The proper approach in evaluating a letter said to contain speech protected by U.S. Const. amend. I, is to consider the letter as a single expression of speech to be considered in its entirety.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN7] A single expression of speech should not be divided for purposes of applying the Supreme Court's balancing test.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN8] When speech arguably relates to a matter of public concern, this court prefers to apply the approach taken by the United States Supreme Court and weigh whatever public interest commentary may be contained in the letter against the state's dual interest as a provider of public service and employer of persons hired to provide that service.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Public Employees' Speech

[HN9] In deciding to enter the public teaching profession, a citizen does not waive or forfeit his right to comment on matters of public concern. But he can be expected, when doing so, to elect a method which does not frustrate provision of the service he is employed to provide.

COUNSEL: Argued: David Brian Goodhand, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant.

Stephen P. Groves, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina, for Appellees.

On Brief: Athena S. Lai, Student Counsel, Mara J. Lozier, Student Counsel, William J. Nelson, Student Counsel, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant.

Carol B. Ervin, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina; Marvin C. Jones, BOGOSLOW & JONES, Walterboro, South Carolina, for Appellees.

JUDGES: Before WILKINSON, NIEMEYER, and LUTTIG, Circuit Judges. Judge Niemeyer wrote the opinion, in which Judge Wilkinson and Judge Luttig joined.

OPINIONBY: NIEMEYER

OPINION: [*154]
OPINION

NIEMEYER, Circuit Judge:

John W. Stroman was discharged from his employment as a public school teacher in Colleton County, South Carolina, on May 29, 1987, after he wrote and circulated a letter to fellow teachers, complaining about a change that had been made [**2] in the method for paying teachers, criticizing the school district for budgetary mismanagement, and encouraging his fellow teachers to engage in a "sick-out" during the week of final examinations. Following his dismissal, Stroman filed suit under 42 U.S.C. § 1983 against the Colleton County School District and its officials, alleging that his dismissal was impermissibly based on his exercise of free speech and therefore violated the First Amendment. The district court granted defendants' motion for summary judgment, concluding that any protected speech in the letter was not a substantial or motivating factor for Stroman's discharge and that the portion of the letter proposing a "sick-out" did not constitute speech protected by the First Amendment. Although we disagree with some of the district court's reasoning, we nevertheless affirm for the reasons given hereafter.

I

Because of an impending budgetary crisis, the Colleton County School District announced in the spring of 1987 that, in lieu of paying teachers a lump sum for the summer months, as had been the custom, the School District would pay teachers bi-weekly.

John Stroman, a teacher for some ten[**3] years in Colleton County, responded to the new policy by writing and circulating a letter to fellow teachers in which he expressed his objection to any delay in receiving pay caused by the new policy, criticized the School District's management of the budget, and encouraged a "sick-out" during exam week to "show the administration that we are together as teachers" and "to take a stand." The letter read in relevant part:

Ha! Da! Ha! Ha! Ha!

Last year we got paid in all sorts of manners. This year is worse because we might have to wait for two pay periods before getting paid. Do you know that after the payroll on the 30th all of the money is supposed to be gone? Yes, Mr. Smoak and his convoy were not able to borrow the money on their most recent trip to New York. Everyone knows when you spend money for the coming year to pay off this year's salaries and don't ask to get more to replace it, the deficiency will grow and soon there will be no money. None. If in some way we are paid in June and the rest of the summer, next school year will be worse.

It seems as though the personnel downtown should be[**4] able to balance a budget. Do they really know just what's going on? God knows there are enough of them. Funny, Gene Odom was not on that convoy to the city. Just stop and [*155] look around: at one school, I know they have seven administrators.

Down at Central Office they have several positions filled that one person can do. Have we really grown that much? Funny how new positions are created for some administrators that were relieved [sic] from another. These are positions we don't need or could be filled by someone with lower salaries. Make a position to full sic the person. People, we are top-heavy and can do nothing but sink. And

we will be the ones to suffer.

* * *

Some of us may not need all of our money, but some of us do. We must help one another because the next time you may need help. Just think of it. It is time the teachers in this County show the administration that we are together as teachers.

* * *

Some of us will like to have a sick-out exam week if we can get about 10-25% to do so. If you are willing to take a stand with us, [**5] please let me (John Stroman) know by Wednesday, May 27, 1987.

* * *

P.S.If you feel as strongly as I do, please discuss it and

gather support.

On receiving a copy of the letter, the superintendent of the School District, A. L. Smoak, Jr., became concerned, in particular about the paragraph that proposed a "sick-out," which he marked with a red pencil. He promptly called a meeting with Stroman for the next day to which he also invited Stroman's school principal, Franklin L. Smalls. At the meeting, Stroman admitted that he had drafted and circulated the letter. He also complained to the superintendent that "he was being mistreated as far as his pay was concerned." During the course of the meeting, Smoak handed Stroman a letter of dismissal dated that day, May 29, 1987, which stated in pertinent part:

This letter is to inform you that you are dismissed and suspended from your duties as a teacher for the Colleton County School District effective immediately. The suspension is imposed because I have found and concluded that cause exists for your dismissal and in my opinion immediate suspension is necessary to remove a substantial[**6] and material disruptive influence in the educational process at Colleton Middle School, Campus A. The grounds for dismissal are that you have shown evident unfitness for teaching by proposing to abandon your duties during the week of June 1, 1987, and by inciting and encouraging other teachers to leave their employment during the same week.

No other action was taken to avert the "sick-out," and nearly all of the faculty attended school during the examination period.

Stroman appealed the superintendent's decision and, following a hearing on June 7, 1989, the Colleton County Board of School Trustees affirmed. Stroman thereafter filed suit under 42 U.S.C. § 1983, contending, among other things, that he had been dismissed impermissibly for exercising his right to speak on issues of public importance. The district court granted the defendants' motion for summary judgment on the ground that Stroman's First Amendment rights were not violated. In analyzing Stroman's letter, the court divided it into two parts, "the portion criticizing the budgetary management, and the portion proposing the sick-out during exam week." [**7] The court found the section of the letter which dealt with management of the school budget to be protected speech but not the portion of the letter which encouraged the sick-out, and held that Stroman had offered no proof that his protected speech criticizing the budgetary management played a substantial or motivating role in his discharge. The court further held that, even assuming that the exercise of protected speech had played such a role in the dismissal, Stroman had failed to demonstrate that the same decision would not have been reached absent his exercise of protected speech. This appeal followed.

II

The applicable principles are not disputed. [HN1] A state may not dismiss a public [*156] school teacher because of the teacher's exercise of speech protected by the First Amendment. See *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968); *Piver v. Pender County Board of Educ.*, 835 F.2d 1076 (4th Cir. 1987), cert. denied, 487 U.S. 1206, 101 L.Ed.2d 885, 108 S.Ct. 2847 (1988). Speech by a public school teacher is protected by the First Amendment when (1) the teacher speaks as a citizen about matters of public concern and (2) the teacher's[**8] interest in exercising free speech is not outweighed by the countervailing interest of the state in providing the public service the teacher was hired to provide. The Supreme Court has thus instructed that when the accommodation of the teacher's right

to comment as a citizen on public issues conflicts with the state's interest in providing a public education, the interests must be balanced to determine which is to prevail. See *Pickering*, 391 U.S. at 568; *Piver*, 835 F.2d at 1078. [HN2] Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by the First Amendment, but are matters more immediately concerned with the self-interest of the speaker as employee. *Connick v. Myers*, 461 U.S. 138, 147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). The limit of First Amendment protections was thus described in *Connick*:

[HN3]

While as a matter of good judgment, public officials should

be receptive to constructive criticism offered by their

employees, the First Amendment does not require a public

[**9]

office to be run as a roundtable for employee complaints

over internal office affairs.

Id. at 149.

[HN4]

Whether speech fairly relates to a public concern or expresses a private grievance or a matter of immediate self-interest must be determined by the content, the form, and the context of the speech. *Connick*, 461 U.S. at 147-48. And the issue is one of law, not fact, for the court to decide. Id. at 148 n.7; *Dwyer v. Smith*, 867 F.2d 184, 193 (4th Cir. 1989).

Finally, [HN5] in determining whether the teacher's discharge from employment was based on an exercise of conduct protected by the First Amendment, the teacher has the burden of proving that protected speech played a "substantial" role in the termination decision or was "a motivating factor." The employer may nevertheless rebut the showing by proof that it would have discharged the plaintiff "even in the absence of the protected conduct." *Mount Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The test thus becomes one of whether the teacher would have[**10] been retained or rehired "but for" his exercise of speech protected by the First Amendment. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 417, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979).

With these principles stated, we turn to the question of whether the letter circulated by Stroman was an exercise of First Amendment rights for which he could not permissibly have been discharged.

III

Stroman contends that (1) the district court erred in dividing his letter into two parts for purposes of determining whether it constituted speech protected by the First Amendment; (2) the letter taken as a whole dealt with matters of public concern and was a motivating factor in the decision to fire him; (3) the School District failed to show that the letter actually "disrupted the operation of the school"; and (4) the School District failed to show that it would have fired Stroman even in the absence of the protected conduct.

The School District does not dispute the contention that circulation of the letter was the reason that Stroman was fired. It urges, however, that the letter represents an employee grievance and, as a matter of law, does not constitute commentary on a matter of public[**11] concern. The School District contends alternatively that the State's interests as a provider of public service and as an employer outweigh Stroman's First [*157] Amendment interest in the letter, arguing in particular:

Stroman's act of promoting a strike during exam week was sheer insubordination. Such an action would surely inhibit the interest of Colleton County, as an employer, in promoting the efficiency of the public services it performs through its employees. [Internal quotations omitted]. It was clearly against settled policy to take sick leave unless ill.

In granting defendants' motion for summary judgment, the district court divided Stroman's letter into two parts, analyzing separately the letter's criticisms of the School District's budgetary management and its proposal that the teachers engage in a sick-out. The court found that while the first part of the letter constituted protected speech because it did not threaten any legitimate employer concerns about an efficient and effective workplace, it was not a motivating

factor in the termination decision. The court found that the portion of Stroman's letter which advocated a sick-out, however, [**12] was not protected because it potentially created disharmony in the workplace, impeded Stroman's ability to perform his duties, and called into question the teacher's professional competence, and that it was this section that was the motivating factor in Stroman's discharge.

We agree with Stroman that it was improper for the district court to have divided his letter into discrete components to conduct a constitutional analysis on each. We conclude rather that [HN6] the proper approach is to consider the letter as a single expression of speech to be considered in its entirety. We read the Court's decision in *Connick* to require just such an approach. There, an employee-circulated questionnaire that "touched upon matters of public concern in only a most limited sense" was nevertheless considered as a single expression of speech and subjected to a balancing of interests as established in *Pickering*. *Connick*, 461 U.S. at 154. Other courts have adopted a similar reading of *Connick*. See, e.g., *Johnsen v. Independent Sch. Dist.*, 891 F.2d 1485, 1492 (10th Cir. 1989) (noting that "courts have cited *Connick* for the [**13] proposition that [HN7] a single instance of speech should not be divided for purposes of applying the *Pickering* balance"); *Kurtz v. Vickrey*, 855 F.2d 723, 732 n.7 (11th Cir. 1988) ("the Court [in *Connick*] applied the *Pickering* balance test to the survey as a whole, rather than to the single question relating to a matter of public concern"). We will therefore view the Stroman letter as a whole for purposes of a First Amendment analysis.

The School District urges us nevertheless to find that the letter taken as a whole amounts to no more than a personal grievance, thereby obviating the need for any further constitutional analysis. We agree that a personal grievance prompted the letter, which was written in response to a change in the practice of paying teachers in a lump sum for summer work. The substance of the letter, in large part, seems to be limited to this grievance. It opens with a recitation of the payment change and expresses a fear that the new practice, coupled with a budgetary crisis in the School District, might leave teachers without money. After criticizing School District management, the letter continues with the generalized[**14] complaint, "Some of us may not need all our money, but some of us do. . . . It is time the teachers in this County show the administration that we are together as teachers." The letter concludes with the proposal to engage in a "sick-out" during final exam week "to take a stand." The School District's position is further corroborated by Stroman's reiteration of his complaint at the May 29 meeting with the School District superintendent when he said that "he was being mistreated as far as his pay was concerned." Were this the entire evidence, we would readily agree that the speech amounted to no more than an employee grievance not protected by the First Amendment.

Some doubt, however, is raised by the complaints in the letter regarding school officials' alleged mismanagement of the budget. In addition to complaints about publicly funded out-of-town trips by School [*158] District personnel, the letter observes that the administration cannot balance a budget and cannot cut unnecessary personnel. It states, "People, we are top-heavy and can do nothing but sink. And we will be the ones to suffer." While these types of comments could be construed as another part of the complaint of an employee[**15] unhappy with a change in a pay practice, they might also reflect the complaint of a citizen concerned about budget mismanagement, particularly if taken as a separate statement. See *Pickering*, 391 U.S. at 571-72 ("the question whether a school system requires additional funds is a matter of legitimate public concern. . . . Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."). Any conclusion is further clouded by the on-going public debate in Colleton County, generated by cumulated deficits in the School District budget, over whether issuance of public revenue bonds would be necessary.

[HN8]

When speech arguably relates to a matter of public concern, we prefer to apply the approach taken in *Connick* and weigh whatever public interest commentary may be contained in the letter against the state's dual interest as a provider of public service and employer of persons hired to provide that service. See *Pickering*, 391 U.S. at 568.

[**16]

IV

In its letter of dismissal to Stroman, the Colleton County School District focused on Stroman's proposal to call a "sick-out" during the week for which final examinations were scheduled. The letter stated as the cause for discharge:

The grounds for dismissal are that you have shown evident

unfitness for teaching by proposing to abandon your duties

during the week of June 1, 1987, and by inciting and encouraging other teachers to leave their employment during the same week.

Stroman contends that there was no evidence to suggest that there was a danger that the sick-out would in fact occur and that his letter was only a proposal to engage in one. We think that this contention misses the point. The State's interest is not limited to preventing actual disruption. To have called for a sick-out when teachers were not sick was an appeal for dishonest conduct, conduct that was in violation of School District policy and the teachers' contracts, and conduct that could legitimately have been questioned on professional grounds. The School Board was prompted to fire Stroman not because a sick-out was likely to occur but rather because he exercised such[**17] flawed judgment in urging one. Stroman's letter revealed his willingness to abandon his post and to urge others to do likewise. As the Court in Connick observed:

We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

461 U.S. at 152.

Public education is recognized as one of the most important public services offered by state government, and the maintenance of a professional and dedicated teaching staff to provide that service continuously ranks among the State's highest concerns. * [159] When South Carolina subscribed to an interstate Compact for Education, a formal arrangement among subscribing states for the development of ideas and policies and the exchange of information relating to education, it agreed that "the proper education of all citizens is one of the most important responsibilities of the states to preserve a free and open society in the United States." S.C. Code § 59-11-10. In providing public education, the State therefore expects to enter into employer-employee relationships[**18] with teachers that permit it to assure delivery of the service in a manner that best serves the students and the community. State requirements for the attendance of teachers and their supervision of the students are therefore both necessary and desirable.

-----Footnotes-----

For example, in 1749 Benjamin Franklin wrote:

The good education of youth has been esteemed by wise men in all ages as the surest foundation of the happiness both of private families and of commonwealths. Almost all governments have therefore made it a principal object of their attention to establish and endow with proper revenues such seminaries of learning, as might supply the succeeding age with men qualified to serve the public with honor to themselves and to their country.

* * *

For though the American youth are allowed not to want capacity; yet the best capacities require cultivation, it being truly with them, as with the best ground, which, unless well tilled and sowed with profitable seed, produces only ranker weeds.

A Plan for The Education of Youth in Pennsylvania, from The Benjamin Franklin Reader (Nathan G. Goodman ed., reprinted in The College Years, A. C. Spectorosky ed., 1958).

-----End Footnotes-----

[**19]

Thus, it is not surprising that the Colleton County School District has adopted regulations that require teachers to remain professional in their relationships with students and that impose on teachers the duty of student supervision. For example, in defining a teacher's job, School District policy provides:

No group of children, either in the classroom or on the playground,
should be left unattended by the teacher. . . .

Teachers shall be in attendance at their schools fifteen
minutes prior to the time that their pupils report, and shall
remain in their classrooms fifteen minutes after the official
dismissal of school and at such periods as deemed necessary
by the Principal, Directors of Schools, or the Superintendent.

Recognizing necessary exceptions to the attendance policy, the School District also grants sick leave and personal days. But sick leave is limited for use during sickness, maternity leave, personal disability, and the sickness of immediate family members. While the policy also permits that two days of sick leave per year may be used for "personal leave," it prohibits use of personal leave days during "semester [**20] and yearly examination periods."

Therefore, when Stroman proposed to take a sham sick-leave during the final examination period and urged others to do so to protest and "take a stand," he suborned a misrepresentation about sick leave and encouraged a deliberate violation of regulation and employment terms, for which the provided sanction is dismissal. He also took aim at established standards of professionalism by urging teachers to abandon their duties during exam week when supervision would be particularly needed.

We recognize that, [HN9] in deciding to enter the public teaching profession, a citizen does not waive or forfeit his right to comment on matters of public concern. But he can be expected, when doing so, to elect a method which does not frustrate provision of the service he is employed to provide. This is particularly so when other methods of speech and conduct are readily available to communicate his concern.

We therefore hold that any First Amendment interest inherent in the letter that Stroman circulated is outweighed by the public interest in having public education provided by teachers loyal to that service and, in particular, in having final examinations proctored[**21] and completed in a timely fashion, and the School District's employer interest in having its employees abide by reasonable policies adopted to control sick leave and maintain morale and effective operation of the schools. We recognize that Stroman's comments about the School District's purported mismanagement may involve matters of public concern. Nevertheless, we view the essential thrust of the letter as expressing an employee grievance about changes in the method of pay. Thus we believe that the Supreme Court's conclusion in *Connick* is equally applicable here:

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment [*160] interest involved here does not require that *Connick* tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

461 U.S. at 154.

The judgment of the district[**22] court is, for the reasons that we have given, affirmed.

AFFIRMED

SUBURBAN HOSPITAL, INC. v. William DWIGGINS
No. 90, September Term, 1990

Court of Appeals of Maryland

324 Md. 294; 596 A.2d 1069; 1991 Md. LEXIS 175; 6 BNA IERCAS 1500; 125 Lab. Cas. (CCH) P57,414

October 15, 1991
October 15, 1991, Filed

PRIOR HISTORY: [***1]

Certiorari to Court of Special Appeals; Circuit Court for Montgomery County; William C. Miller, Judge.

DISPOSITION: JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR ENTRY OF JUDGMENT IN FAVOR OF PETITIONER. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer filed a petition for certiorari to appeal the judgment of the Circuit Court for Montgomery County (Maryland), which affirmed the trial court and ruled in favor of plaintiff former employee in an action for breach of an employment contract.

OVERVIEW: The former employee contended that the employer unfairly fired him from his job as a building maintenance supervisor. Following an initial complaint on the employee's job performance, the employee signed a reinstatement policy and was placed on supervision for six months. The employee was fired shortly thereafter. The employee brought the instant breach of contract action, contending that he was dismissed in violation of the terms of the signed reinstatement agreement. The hospital contended that the employee could be terminated at will. The trial and appellate courts held that the reinstatement agreement was a contractual undertaking and that the hospital limited its otherwise vast discretion to discharge the employee. The court held that at-will employment was an employment contract of indefinite duration that could be legally terminated at the pleasure of either party at any time. The former employee's status before the reinstatement agreement was clearly that of an at-will employee. The court held that the hospital did not intend to make the employee harder to fire when they signed the agreement, which was intended as a disciplinary action.

OUTCOME: The court granted the employer's petition for certiorari because the case raised important questions on the subject of at-will employment. The court reversed the appellate court, holding that the employer's motion for judgment on the former employee's breach of employment contract claim should have been granted. The imposition of a grievance procedure did not eliminate the employer's right to terminate an at-will employee.

CORE TERMS: grievance, at-will, reinstatement, fired, handbook, grievance procedure, fair dealing, termination, administrator, hospital administrator, memo, hotel, supervisor, employment contract, fundamentally, covenant, promised, manual, disciplinary, contractual, counseling, right to terminate, personnel policies, employee handbook, contractually, terminated, exhaustive, breach of contract, employment-at-will, transgressions

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN1] In Maryland, at-will employment is an employment contract of indefinite duration. It can be legally terminated at the pleasure of either party at any time.

324 Md. 294, *; 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN2] There are exceptions to the general rule that at-will employees can be terminated at any time for any reason. An at-will employee has a cause of action in tort if his discharge contravened some clear mandate of public policy. Various statutes also restrict an employer's right to terminate at-will employees. For example, if an employer discharges an employee who has filed a workers' compensation claim, he is guilty of a misdemeanor, under Md. Code Ann. § 9-1105 (1991). An employee cannot be fired as a result of time lost from work because he served on a jury, pursuant to Md. Code Ann. § 8-105 (1974).

Labor & Employment Law: Employment Relationships: At-Will Employment

Labor & Employment Law: Wrongful Termination: Breach of Contract

[HN3] Employee handbooks often list transgressions that can result in discipline. Unless there is evidence to the contrary, such lists should not be read as being exhaustive.

Labor & Employment Law: Wrongful Termination: Breach of Contract

[HN4] If an employee is not afforded the job termination procedures outlined in a handbook, the employee may have a breach of contract action against employer.

Labor & Employment Law: Wrongful Termination: Breach of Contract

Contracts Law: Contract Interpretation: Ambiguities & Contra Proferentem

[HN5] As a general rule, the construction or interpretation of all written instruments is initially a question of law for the court. If a written contract is susceptible of a clear, unambiguous, and definite understanding, its construction is for the court to determine. When writings alone evidence a contract, it is for the court to construe the writings, and determine whether there was a contract, and, if so, what that contract was.

Labor & Employment Law: Employment Relationships: At-Will Employment

[HN6] The court refuses to impose a general requirement of good faith and fair dealing in at-will employment situations.

COUNSEL: S. Allan Adelman, Godard, West & Adelman, P.C., Rockville, both on brief, for petitioner.

Theresa M. Hall, Durke G. Thompson, Goldberg, Thompson, Pasternak & Fidis, P.A., Bethesda, all on brief, for respondent.

JUDGES: Eldridge, Rodowsky, McAuliffe, Chasanow, JJ., Marvin H. Smith and Charles E. Orth, Jr., JJ., Court of Appeals of Maryland (Retired, Specially Assigned), and Raymond G. Thieme, Jr., J., Fifth Judicial Circuit of Maryland (Specially Assigned).

OPINIONBY: CHASANOW

OPINION: [*297] [**1070] William R. Dwiggin claims that Suburban Hospital, Inc. (Suburban) unfairly fired him from his job as a building maintenance supervisor. He says that he did not receive a fair hearing in the hospital's grievance system, and he wants the courts to make sure he gets one. Suburban counters that Dwiggin received everything he[***2] was entitled to through the grievance procedures. Dwiggin won a partial victory in both the trial court and the Court of Special Appeals. *Suburban Hospital v. Dwiggin*, 83 Md.App. 97, 573 A.2d 835 (1990).

Because the case raises important questions on the subject of at-will employment, this Court granted Suburban's petition for certiorari.

The Facts

Dwiggin had been employed at Suburban Hospital for a decade before the dispute at issue here arose in 1985. When he was hired, there were no discussions about how long he would be employed. His first duties at Suburban were as a carpenter. In 1980, Dwiggin was promoted to building maintenance supervisor, and during the [**1071] following two years, he was praised for his job performance.

324 Md. 294, *; 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

Suburban set forth a number of written policies for employees. Early in 1981, the director of personnel and the hospital administrator signed a policy on disciplinary action that told employees what they could expect from the hospital and created certain requirements that officials had to meet when disciplining employees. For example, an employee's suspension "must be validated by a counseling memo forwarded[***3] to the personnel department. All cases of suspension must have prior review by the department head [*298] and division head." If an employee was to be fired, more stringent procedures were to be followed: "Review by the department head, division head, personnel department, and hospital administrator is required for termination of an employee."

A worker aggrieved by a decision of a supervisor could seek review through both an informal and then a formal process that included review by a four-member ad hoc grievance committee. Two committee members would be appointed by the director of personnel; the other two would be chosen by the employee. The grievance committee would then review the issue and inform both sides of its decision within two working days. Either side was given the option of appealing to the hospital administrator.

The process ended with the hospital administrator. According to Suburban's policy and procedure statement, "The administrator will consider the grievance and within five working days decide upon its disposition. The decision of the administrator will be final."

A year later, in 1982, Suburban adopted a "code for employee relations" and promised "to[***4] protect the privileges, interests, and benefits of its employees" In this document, the hospital declared that it would establish written standards for job performance and would "permit and encourage any employee" to present grievances "to the appropriate supervisor for settlement." If the complaint had not been handled to the employee's satisfaction at that level, he or she was promised that the matter would "be dealt with at successively higher levels of management in accordance with an established, written procedure."

The hospital published a reinstatement policy in 1983. In it, Suburban said, "Reinstatement is an offer and acceptance of any position within six months of separation from the hospital." A reinstated employee would "be placed in a three month probationary period."

In 1985, Dwiggins found that a wall being built inside the hospital was going to block an elevator entrance if construction [*299] plans were followed. To solve this problem, he amended the plans on his own by ordering a bend in the wall. When Suburban's associate administrator, Paul Quinn (Quinn), found out, he suspended Dwiggins for three days and recommended that he be fired. Dwiggins' [***5] transgressions were four-fold, according to Quinn: (1) he had built the wall without approval from the administration; (2) he had failed to get a building permit; (3) he had spent money without the necessary clearance; and (4) he had not told laboratory personnel what he was doing so that they could protect their equipment.

Dwiggins invoked the hospital grievance procedure. An ad hoc committee decided that he should not be blamed on the first two allegations. Rather than agree that Dwiggins should be fired, the committee recommended that he be placed on probation with a number of specific restrictions. After reviewing the committee's recommendations, the hospital administrator concurred. She warned Dwiggins that he would have to follow written guidelines for his work and that he would be placed on six months probation "with the understanding that any violations of the written guidelines will be grounds for immediate termination."

Dwiggins signed the administrator's letter outlining the restrictions and returned it as requested, agreeing to the terms of his reinstatement. On July 2, 1985, the day he was scheduled to resume work, Dwiggins signed a document entitled, "Per[**1072] [***6] formance Conditions," which spelled out specific work rules as follows:

"No construction requiring a building permit may be undertaken without the appropriate signed permit from the County.

No outside contractor can be engaged without signed approval from Administration.

Construction must be coordinated with all departments involved.

324 Md. 294, *, 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

No keys may be made or changed without individual and specific approval of the Associate Administrator or the Administrator.

[*300] No field changes may be made to any Ward Hale project without specific administrative signed authorization by the Associate Administrator or the Administrator."

The conditions were followed by the warning: "Failure to comply with any of these provisions during the probationary period will result in immediate termination." John Marynowski, Suburban's Director of Engineering/Maintenance and Dwiggins' supervisor, co-signed the document.

Two months later, Marynowski filed a formal "counseling memo" complaining about Dwiggins' performance. He accused Dwiggins of showing "poor judgment in job planning and supervision in completing the renovation of radiology and the installation of the dishwasher" Specifically, [***7] Marynowski said that the job was finished a week late and that the work was badly coordinated by Dwiggins.

On September 16, Marynowski filed another counseling memo saying that, Dwiggins "has again demonstrated poor followup and a lack of concern of his responsibility as a supervisor." The memo was read to Dwiggins.

Finally, on September 26, 1985, Marynowski filed a counseling memo recommending that Dwiggins be fired for failing to abide by the reinstatement agreement he and the hospital administrator signed. Specifically, he accused Dwiggins of violating the condition forbidding him to hire an outside contractor -- Peak Sheet Metal -- without signed administration approval.

Dwiggins again brought the hospital's grievance system into play, arguing that the accusation was false and that he had not hired Peak Sheet Metal in violation of the reinstatement agreement. Suburban's Personnel Relations Coordinator decided against Dwiggins. In accordance with the grievance procedure, the matter then went to a four-member ad hoc committee, two of whose members were selected by Dwiggins. The proceedings before the ad hoc committee were not recorded. We are informed that Dwiggins was permitted[***8] to present a letter from Al Peak of Peak Sheet Metal, but Peak was not called as a witness. Dwiggins also [*301] alleges that he was not present when Quinn was interviewed by the committee. After reviewing the evidence, the committee decided that Dwiggins was accountable even if he had not personally contracted to engage Peak Sheet Metal to work at the hospital. "[S]ince the project was [Dwiggins'] responsibility then it was his responsibility to bring them in," the committee reasoned. "[I]t was [Dwiggins'] responsibility to get written prior approval to bring in the contractor to do the work." Dwiggins, the committee concluded, should be fired.

As required by the grievance procedure, the hospital administrator reviewed the case as well as a letter from Dwiggins' attorney. On November 1, 1985, the administrator wrote Dwiggins a letter saying, "it is my decision that your termination be upheld and that you not be reinstated."

Dwiggins then filed a breach of contract action, contending in part that Suburban had breached a contractual duty to follow the grievance procedures the hospital had established for employees. He also argued that the written reinstatement agreement he[***9] had signed was a legally enforceable contract and that the hospital dismissed him in violation of the agreement's terms. Suburban countered that Dwiggins was an at-will employee and the reinstatement agreement did not change that status. The hospital also argued that the grievance procedures it established had been followed to [**1073] the letter; therefore, Suburban said, Dwiggins could be fired at its pleasure.

In essence, Dwiggins has two basic complaints: (1) he should not have been fired except for just cause because the reinstatement agreement showed that he was not an at-will employee, and (2) the grievance process was unfair.

After a trial in the Circuit Court for Montgomery County, a jury awarded damages to Dwiggins totalling \$35,809, an amount later reduced by stipulation to \$31,259, for breach of contract based on the reinstatement agreement. On appeal, the Court of Special Appeals held that the reinstatement agreement constituted a legally enforceable contract [*302] between Dwiggins and Suburban. But the intermediate appellate court remanded the case for a determination whether the grievance process used by the hospital was "fundamentally fair" and whether [***10] "the rules governing it [had been] substantially followed" 83 Md.App. at 118, 573 A.2d at 846.

324 Md. 294, *; 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

The Court of Special Appeals held that "[t]he reinstatement agreement certainly was a contractual undertaking." 83 Md.App. at 109, 573 A.2d at 841. "Considering that agreement together with the underlying policies that authorized and led to it, we have no hesitation in concluding that the hospital did, in fact, contractually limit its otherwise vast discretion to discharge Mr. Dwiggins at any time and for any reason." *Id.*

By agreeing to a formal set of "performance conditions" in the reinstatement agreement, the Court of Special Appeals reasoned,

"the hospital implicitly, but contractually, assured Mr. Dwiggins that he would not be disciplined for job conduct that was consistent with and not violative of those conditions. If this were not so -- if the undertaking did not have that effect -- it would be merely a sham, and there is no evidence that the hospital ever intended it as such."

83 Md.App. at 110, 573 A.2d at 842. The intermediate appellate court also viewed Suburban's grievance[***11] system as a neutral arbitration designed to fairly and conclusively resolve employee complaints. "In creating such a dispute resolution mechanism and committing itself to abide by it, the hospital necessarily ceded a certain measure of its discretion to make snap and final judgments in this area." *Id.* The Court of Special Appeals held that, in order for a grievance procedure to be final and binding, it must be "fundamentally fair." That court remanded for the lower court to hold an evidentiary hearing and "[i]f the court finds that the proceeding was fundamentally fair and that the rules governing it were substantially followed, it should dismiss the action against the hospital." 83 Md.App. at 118, 573 A.2d at 846.

[*303] [HN1] In Maryland, at-will employment is an employment contract of indefinite duration. It can be legally terminated at the pleasure of either party at any time. *Adler v. American Standard Corporation*, 291 Md. 31, 35, 432 A.2d 464, 467 (1981). H.G. Wood, *A Treatise on the Law of Master & Servant* (1877), a late 19th Century work on employment law, has been credited with bringing the at-will rule [***12] to national attention, though cases adopting the doctrine can be found even earlier. See S. Mazaroff, *Maryland Employment Law*, § 1.8 at 50-54 (1990). The doctrine was born during a laissez-faire period in our country's history, when personal freedom to contract or to engage in a business enterprise was considered to be of primary importance. See *Love, Greeley v. Miami Valley Maintenance Contractors, Inc.: Has Ohio Gone Too Far in Creating a Public Policy Exception to the Employment At Will Doctrine?*, 18 N.Ky.L.Rev. 543, 544-47 (1990); Massingale, *At-Will Employment: Going, Going . . .*, 24 U.Rich.L.Rev. 187, 188-89 (1990).

[HN2] There are exceptions to the general rule that at-will employees can be terminated at any time for any reason. As we discussed in *Adler*, an at-will employee has a cause of action in tort if his discharge "contravened some clear mandate of public policy." 291 Md. at 43-47, 432 A.2d at 471-73. See *Ewing v. Koppers Co.*, 312 Md. 45, 537 A.2d 1173 (1988). Various statutes also restrict an employer's right to terminate at- [**1074] will employees. [***13] For example, if an employer discharges an employee who has filed a workers' compensation claim, he is guilty of a misdemeanor. Maryland Code (1991), Labor and Employment Article, § 9-1105. An employee cannot be fired as a result of time lost from work because he served on a jury. Md.Code (1974, 1984 Repl.Vol.), Courts and Judicial Proceedings Art., § 8-105.

It is apparent that Dwiggins was an at-will employee at Suburban Hospital, at least when he began work with the institution in 1975. But the Court of Special Appeals read into the reinstatement agreement an assurance that Dwiggins would not be disciplined as long as his work did not [*304] violate the agreement's "performance conditions." 83 Md.App. at 110, 573 A.2d at 842. In other words, whatever Dwiggins' status was before the reinstatement agreement, that document liberated him from being an at-will worker. In effect, that means that after July 2, 1985, the date he signed the agreement, Dwiggins could be fired only for cause. We do not believe that the parties intended to make Dwiggins harder to fire when they signed an agreement intended as part of a disciplinary action.

The "performance[***14] conditions" listed in the reinstatement agreement serve one purpose: They tell Dwiggins what he should be particularly careful about in light of his prior problems with the administration. They are not to be read as setting forth the only transgressions that could lead to Dwiggins' discharge. As one court noted: "The assertion that a probation memo constitutes an implied contract for further employment is a rather novel theory and appears to have no basis in law. As noted by defendant, the import of the memo was simply to identify to plaintiff existing

324 Md. 294, *, 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

deficiencies in his work performance and to notify him that inaction would result in the termination of his employment." *Stevenson v. Potlatch Corporation*, 674 F.Supp. 1410, 1417-18 (D.Idaho 1987), *aff'd*, 874 F.2d 816 (9th Cir.1989). At oral argument, Suburban's counsel made an apt analogy: Suppose a parent tells a teenager that if he puts one more dent in the family car, he won't be allowed to drive it again. That warning could not possibly mean that denting the automobile has suddenly become the only basis for denying the youngster the use of the car.

[HN3] Employee handbooks often list transgressions[***15] that can result in discipline. Unless there is evidence to the contrary, such lists should not be read as being exhaustive. See *Novinger v. Eden Park Health Services*, 167 A.D.2d 590, 563 N.Y.S.2d 219, 220 (N.Y.App.Div.3d 1990) (grounds for termination in manual not exhaustive), appeal denied, 77 N.Y.2d 810, 571 N.Y.S.2d 913, 575 N.E.2d 399 (1991); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 317 (6th Cir.1989) (handbook gave fifteen specific situations [*305] "which may warrant immediate discharge without warning"; these acts were not the exclusive permissible grounds for discharge and plaintiff could be terminated for "poor performance"); *Johnston v. Panhandle Co-op Ass'n*, 225 Neb. 732, 741, 408 N.W.2d 261, 268 (1987) (although handbook gave examples of good cause for discharge, it did not limit the reasons for dismissal to those examples); *Hinson v. Cameron*, 742 P.2d 549, 555-56 (Okla.1987) (handbook contained extensive list of offenses for which employees could be discharged, but it was not exhaustive and thus did not constitute[***16] the basis for an implied contract to discharge only for good cause); *Enis v. Continental Illinois Nat. Bank*, 795 F.2d 39, 42 (7th Cir.1986) ("The language [listing serious infractions that could result in immediate termination] cannot sensibly be limited to the instances given. That would imply that if an employee murdered a coworker he could not be immediately dismissed, because he was not being insubordinate, or stealing, or drug dealing."). We hold that the reinstatement agreement did not restrict the bases on which the hospital could terminate Dwiggins.

Although the reinstatement agreement and the personnel policies did not limit the grounds upon which the hospital could discharge Dwiggins, the personnel policies may have limited the procedures[**1075] which the hospital could use to discharge him. See *Carnes v. Parker*, 922 F.2d 1506, 1511 (10th Cir.1991) ("Although procedural protections themselves are not sufficient to create a property interest in continued employment, they can sustain an entitlement to the procedures themselves."); See also *Perman v. ArcVentures, Inc.*, 196 Ill.App.3d 758, 143 Ill.Dec. 910, 915, 554 N.E.2d 982, 987 (1990).[***17]

Dwiggins contends that the hospital did not live up to the contractual obligations it created when it published various employment policies. There is no doubt that, in its policy and grievance statements, Suburban made promises to Dwiggins and other employees that the hospital was contractually required to keep. "[E]mployer policy directives [*306] regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer." (Citations omitted). *Dahl v. Brunswick Corporation*, 277 Md. 471, 476, 356 A.2d 221, 224 (1976). [HN4] If an employee is not afforded the job termination procedures outlined in a handbook, the employee may have a breach of contract action against employer. See *Pine River State Bank v. Mettile*, 333 N.W.2d 622, 630-31 (Minn.1983); *Cassel v. Ancilla Development Group, Ltd.*, 704 F.Supp. 865, 866-67 (N.D.Ill.1989); Cf. *Land v. Michael Reese Hospital and Medical Center*, 153 Ill.App.3d 465, 106 Ill.Dec. 470, 472, 505 N.E.2d 1261, 1263 (1987) (employee entitled[***18] to grievance procedure spelled out in handbook); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880, 892 (1980) (if employer establishes personnel policies and practices, it has created obligations). The question, therefore, is what Suburban promised and whether Dwiggins was given what was due him.

[HN5] "[A]s a general rule, the construction or interpretation of all written instruments is [initially] a question of law for the court" *Gordy v. Ocean Park, Inc.*, 218 Md. 52, 60, 145 A.2d 273, 277 (1958). See also *Rothman v. Silver*, 245 Md. 292, 296, 226 A.2d 308, 310 (1967) ("If a written contract is susceptible of a clear, unambiguous, and definite understanding, . . . its construction is for the court to determine."); and *University Nat'l Bank v. Wolfe*, 279 Md. 512, 521-22 n. 7, 369 A.2d 570, 575 n. 7 (1977) ("When writings alone evidence a contract, it is for the court to construe the writings, and determine whether there was a contract, and, if so, what that contract was.") See also *Keyworth v. Industrial Sales*, 241 Md. 453, 456, 217 A.2d 253, 255 (1966).[***19]

If there is an ambiguity in a document, the drafter -- in this case, Suburban -- will have the ambiguity construed against it. "[A]mbiguities in an instrument are resolved against the party who made it or caused it to be made, because that party had the better opportunity to understand [*307] and explain his meaning." *King v. Bankerd*, 303 Md. 98, 106, 492 A.2d 608, 612 (1985). See also *Truck Ins. Exch. v. Marks Rentals*, 288 Md. 428, 435, 418 A.2d 1187, 1191 (1980);

324 Md. 294, *; 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***, 6 BNA IER CAS 1500

Biskupich v. Westbay Manor Nursing Home, 33 Ohio App.3d 220, 515 N.E.2d 632, 634 (1986) (If the employer was responsible for drafting an employee manual, the terms of the manual will be strictly construed against the employer).

By creating and disseminating its grievance procedures, Suburban promised merely that they would be followed. A similar situation arose in Hawaii in the case of *Edwing P. Pagdilao (Pagdilao)*, who was fired from his job as a bellman at the Maui Inter-Continental Hotel. *Pagdilao v. Maui Inter-Continental Hotel*, 703 F.Supp. 863 (D.Hawaii 1988). Pagdilao, an at-will employee, had***20] drunk too much beer at two employee picnics. At the second gathering, he ran afoul of the hotel's security director, who then recommended that Pagdilao be fired for insubordination and swearing. The hotel's grievance mechanism -- known as the Kokua Procedure -- was brought into action. At the conclusion of the process, Pagdilao was fired. Pagdilao filed suit contending in part that he had an implied-in-fact contract with the hotel based on his employee handbook.

The court rejected his argument, saying that Pagdilao "was given all that was [**1076] promised to him in the Employee Handbook." 703 F.Supp. at 867. In granting the hotel's motion for summary judgment, the court observed: "The only promise to employees is that they will be permitted to pursue the Kokua Procedure." *Id.* The hotel followed the procedure; consequently, the employee handbook provided no basis for liability. In the case before us the hospital lived up to its obligations to Dwiggins by acting in accordance with every step in its grievance system. Having done that, Suburban owed Dwiggins nothing more. See *Carnes*, 922 F.2d at 1511-12 (employee had right to grievance[***21] procedures, not continued employment: "We are convinced the Hospital gave Carnes all the process to which she was entitled based on the personnel manual plus much more." [**308] (Emphasis in original.)); *Perman*, 143 Ill.Dec. at 915, 554 N.E.2d at 987 (Employee manual created contractual right to an established grievance procedure which employer followed.); *Meleen v. Hazelden Foundation*, 740 F.Supp. 687, 692 (D.Minn.1990) ("Plaintiff got all the procedure she was due under the employment contract. She, perhaps understandably, would like something more. But, this was a private contract; no right to constitutional due process or proof beyond a reasonable doubt existed. Plaintiff's private expectations and due process concepts are not part of the employment contract."), *aff'd*, 928 F.2d 795 (8th Cir.1991); *Goodlett v. Blue Cross and Blue Shield*, 234 Neb. 5, 449 N.W.2d 9, 11-12 (1989) ("The employer did not breach the employment contract because the employer followed the disciplinary procedure contained in the handbook."); *Plummer v. Humana of Kansas, Inc.*, 715 F.Supp. 302, 304 (D.Kan.1988)[***22] ("Even if an employment contract did exist, Plummer would certainly be bound by that contract's terms. The Handbook provided that if an employee felt Humana had violated its own policies, the employee's sole recourse was to use the grievance procedure."); *Salanger v. U.S. Air*, 611 F.Supp. 427, 431 (D.C.N.Y.1985) (all contractual obligations relating to employee's discharge were met where grievance procedures provided a forum to appeal termination-for-cause decisions and were made available to employee); *Grozek v. Ragu Foods, Inc.*, 63 A.D.2d 858, 406 N.Y.S.2d 213, 214 (1978) ("Assuming that the handbook represents a binding agreement between plaintiff and defendant, plaintiff must be held to have accepted the complaint procedures provided for therein and the rules by which his actions were to be judged.").

Fairness of the Grievance Process

In holding that Suburban's grievance procedures were legally required to be fundamentally fair and unbiased, the Court of Special Appeals treated the hospital's disciplinary system as if it were an arbitration designed to be the final resolution of the issues presented to it. 83 [**309] Md.App. at 113-18, 573 A.2d at 843-46.[***23] But it was not meant to be so. The system was not a binding arbitration agreement; it was merely a mechanism established by the hospital to give employees an opportunity to complain about disciplinary actions.

Suburban's policy set out the procedures Dwiggins was entitled to have followed. Dwiggins is not entitled to have the court impose additional requirements. Dwiggins was still an at-will employee. Adding the element of general fairness and due process to the grievance procedure alters this at-will status, and care should be taken before a court decides that the parties intended such a result. Cf. *Sullivan v. Snap-on Tools Corp.*, 708 F.Supp. 750, 753 (E.D.Va.1989) ("An employer's promise to discharge an employee only for just cause should be explicit and unambiguous, and such an intent should be clearly expressed."), *aff'd*, 896 F.2d 547 (4th Cir.1990).

Although we have generally implied a covenant of fair dealing in negotiated contracts, n1 there is no implied covenant [**1077] of fair dealing with regard to termination by either side in an employment-at-will. The employer or employee may terminate "at-will" even though to do so[***24] might be unfair to the other. Any modifications to the employment relationship in the instant case were self-imposed by the employer and unilateral. The employees remained free to quit

324 Md. 294, *; 596 A.2d 1069, **;
1991 Md. LEXIS 175, ***; 6 BNA IER CAS 1500

the employment at any moment for any reason, and no grievance procedure would be available to the employer. If an employer unilaterally adds specific limitations or conditions on the right to terminate at-will, those specific limitations or conditions should be enforced by the courts, but they should not be expanded by the courts. Specific modifications to the at-will relationship [*310] should not be an indication that the employer intends to go beyond the specific modifications and add an implied covenant of fair dealing to the at-will relationship.

-----Footnotes-----

n1 See, e.g., *Julian v. Christopher*, 320 Md. 1, 9, 575 A.2d 735, 739 (1990); *Food Fair v. Blumberg*, 234 Md. 521, 534-36, 200 A.2d 166, 174-75 (1964); *Automatic Laundry v. Demas*, 216 Md. 544, 550-55, 141 A.2d 497, 500-01 (1958); 5 *Williston on Contracts*, § 670 at 159 (3d ed.1961).

-----End Footnotes-----

[***25]

An employer may limit his right to terminate a worker by establishing virtually any disciplinary procedure. But courts must not read more into the procedure than is there. Unless some public policy is implicated, employee grievance mechanisms should be analyzed only for what they offer; they must not be seen automatically as quasi-judicial forums for final and impartial dispute resolution governed by standards of due process and neutral fairness.

[HN6] To the extent that we are asked to impose a general requirement of good faith and fair dealing in at-will employment situations, we decline the invitation. "[A] small number of courts have implied a covenant of good faith and fair dealing into employment contracts The majority of courts confronting the issue, however, have refused on both policy and analytical grounds to imply any version of the covenant of good faith and fair dealing into employment contracts." Note, *Reversing the Presumption of Employment at Will*, 44 *Vand.L.Rev.* 689, 699 (1991). It would "amount to the judicial imposition of a collective bargaining agreement, a move best left to the legislature." *Id.* at 700. "Because[***26] at-will agreements allow an employer to discharge an employee for bad cause, the covenant would impose a duty on the employer to use good faith in making bad cause discharges, a proposition that is merely a semantic step away from a flat contradiction." *Id.* See also *Morris v. Coleman Co., Inc.*, 241 Kan. 501, 738 P.2d 841, 849-51 (1987) (surveying states that have considered the question and observing that "the principle of law stated in Restatement (Second) of Contracts § 205, that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement, is overly broad and should not be applicable to employment-at-will contracts"); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 456-57 (Iowa 1989) ("The majority of jurisdictions that [*311] have addressed the [implied] covenant [of good faith and fair dealing in employment contracts] have unequivocally rejected it."); Note, *Wrongful Termination of the Employment-At-Will Rule in California: DeHorney v. Bank of America*, 35 *DePaul L.Rev.* 907, 908 (1986) ("California and a small minority of other jurisdictions [***27] recognize the most liberal exception to the employment-at-will rule and impose a duty of good faith and fair dealing on the employer-employee relationship.").

Because we find that the grievance procedures were followed and there is no need to go further and require that they also be "fundamentally fair," we hold that the trial court should have granted Suburban's motion for judgment on Dwiggins' contract claim.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR ENTRY OF JUDGMENT IN FAVOR OF PETITIONER. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

THE HEARST CORPORATION v. WAYNE HUGHES
No. 56, September Term, 1982

Court of Appeals of Maryland

297 Md. 112; 466 A.2d 486; 1983 Md. LEXIS 296; 9 Media L.Rep. 2504

September 15, 1983, Decided

PRIOR HISTORY: [***1]

Appeal from the Circuit Court for Howard County; Menchine, J., specially assigned, pursuant to certiorari to the Court of Special Appeals.

DISPOSITION: Judgment of the Circuit Court for Howard County affirmed. Costs to be paid by The Hearst Corporation.

CASE SUMMARY:

PROCEDURAL POSTURE: Certiorari was granted with respect to petitioner news corporation's appeal of a judgment from the Circuit Court for Howard County (Maryland), which held news corporation liable for the negligent broadcast of a false and defamatory statement concerning plaintiff manager's conduct of the business of his automobile dealership.

OVERVIEW: On review, news corporation contended that the trial judge had erred in awarding manager damages for emotional distress without proof that the broadcast of consumer complaints impaired manager's reputation. It was news corporation's position that under Maryland law, actual harm to reputation had to be established before any compensatory damages for any harm could be awarded. The court, however, disagreed and held that the rule news corporation sought to apply was not Maryland law and would not be adopted as such. The court then noted that as a matter of Maryland law, the presumption of harm to reputation still arose from the publication of words that were actionable per se, as were the statements in the underlying dispute. The court thus found that although a trier of fact was constitutionally barred from awarding damages based on that presumption in a negligent defamation case, noting in Maryland law barred awards of damages based on proven harm. The court accordingly concluded that as emotional distress damages had been established to the satisfaction of the trier of fact, the trial judge had not erred in awarding judgment in favor of manager.

OUTCOME: The court affirmed the judgment of liability against news corporation.

CORE TERMS: defamation, reputation, impairment of reputation, defamation action, presumed, emotional distress, actual injury, libel, fault, compensatory damages, nominal damages, common law, actionable, punitive damages, defamatory, right to recover, proven, falsity, constitutional malice, humiliation, mental anguish, slander, cause of action, reckless disregard, media, suffering, defamatory publication, injury to reputation, falsehood, defamatory statement

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN1] Actual impairment of reputation is not required to establish the tort of negligent defamation.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN2] The phrase "negligent defamation" means a defamation action in which a private individual has proven that a false defamatory statement was made, but has failed to prove that such statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Torts: Defamation & Invasion of Privacy: Libel

Torts: Defamation & Invasion of Privacy: Slander

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***, 9 Media L. Rep. 2504

[HN3] As either libel or slander, words ascribing conduct to a party that would adversely affect the party's fitness for the proper conduct of his business are actionable per se at common law.

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN4] Under pre-Gertz law, the fact finder in a defamation action predicated on words actionable per se is permitted to assess general damages for the presumed harm to reputation. One reason is that in the case of words or conduct actionable per se, their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. Further, at common law, the defamatory statement is viewed to be presumptively false. Truth is an affirmative defense so that the initial burden of proving falsity does not rest upon the plaintiff.

Torts: Defamation & Invasion of Privacy: Common Law Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN5] The common law rule, for cases not involving punitive damages or questions of privilege, provides that where plaintiff is any person and defendant is any person, then defamatory publication plus falsity equals a cause of action for compensatory damages.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

[HN6] The First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. These alternative standards of fault are called "constitutional malice." In addition, the New York Times rule extends to plaintiffs who are public figures.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN7] The New York Times/Butts rule provides that where plaintiff is a public figure and defendant is any person, then a defamatory publication plus falsity plus fault by constitutional malice standard equals a constitutionally permissible state cause of action for compensatory damages.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN8] For a plaintiff who was not a public figure and defendant engaged in media expression, there may be no liability without fault, but the states may define for themselves the appropriate standard of liability. Secondly, there may be no compensatory damages without evidence of actual harm. Presumed harm to reputation is insufficient. Thirdly, the private defamation plaintiff who did not establish fault by the constitutional malice standard could not recover punitive damages.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN9] The Gertz rule provides that where plaintiff is a private person and defendant is engaged in media expression, then a defamatory publication plus falsity plus fault by a standard less than constitutional malice plus harm equals a constitutionally permissible cause of action for compensatory damages, though punitive damages are not allowed. Under Maryland law, the rules announced in Gertz apply to cases of libel and slander alike brought against non-media defendants, and the standard of fault would be negligence.

Torts: Defamation & Invasion of Privacy: Libel

Torts: Defamation & Invasion of Privacy: Slander

[HN10] The Jacron rule provides that where plaintiff is a private person and defendant is any person, then a defamatory publication plus falsity plus fault by negligence standard plus harm equals a Maryland cause of action for compensatory damages, although punitive damages are not allowed.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN11] The Firestone rule provides that where plaintiff is a private citizen and defendant is engaged in media expression, then a defamatory publication plus falsity plus fault by negligence standard plus harm by way of emotional

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

distress without proof of harm to reputation equals a constitutionally permissible cause of action for compensatory damages, although punitive damages are not allowed.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN12] If the absence of injury or harm to reputation will not prevent an award of compensatory damages where mere negligence is established, it will not do so where the New York Times standard of malice is met.

Torts: Defamation & Invasion of Privacy: Constitutional Privileges

Torts: Defamation & Invasion of Privacy: Defamation Actions

[HN13] As a matter of Maryland law, the presumption of harm to reputation still arises from the publication of words actionable per se. A trier of fact is not constitutionally barred from awarding damages based on that presumption in a constitutional malice case. A trier of fact is constitutionally barred from awarding damages based on that presumption in a negligent defamation case.

Torts: Defamation & Invasion of Privacy: Libel

[HN14] A declaration in libel must contain, inter alia, allegations of damages with some particularity, since Gertz and Jacron forbid presumed damages. Because nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod.

COUNSEL: Theodore Sherbow and Mary R. Craig, with whom were Sherbow, Shea & Tatelbaum, P.A. on the brief, for appellant.

No brief filed for appellee.

JUDGES: Murphy, C. J., and Smith, Eldridge, Cole, Davidson, Rodowsky and Couch, JJ. Rodowsky, J., delivered the opinion of the Court. Eldridge and Davidson, JJ., dissent. Davidson, J., filed a dissenting opinion at page 132 infra, in which Eldridge, J., joins.

OPINIONBY: RODOWSKY

OPINION: [*114] [**487] The principal question presented[***5] in this appeal is whether, in a negligent defamation action, actual impairment of reputation must be proved in order to establish a right to recover compensatory damages, where emotional distress, caused by the defamation, has been proved to the satisfaction of the trier of fact. n1 We shall hold that [HN1] actual impairment of reputation is not required to establish the tort.

-----Footnotes-----

n1 Throughout this opinion, [HN2] the phrase "negligent defamation" means a defamation action in which a private individual has proven that a false defamatory statement was made, but has failed to prove that such statement was made with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964).

Throughout this opinion, the phrase "emotional distress" includes personal humiliation and mental anguish.

-----End Footnotes-----

In July 1975, Dawn Rottman (Rottman) purchased a new American Motors Corporation (AMC) [***6] Matador from Forty West AMC/Jeep, Inc. (40 West). Soon after its purchase, the car evidenced serious mechanical defects. On fifteen occasions, Rottman brought the car to 40 West for warranty service, but the defects were not corrected.

During August 1976, the assets, but not the liabilities, of 40 West were sold to Security AMC/Jeep, Inc. (Security), a Delaware corporation wholly owned by AMC. At that time, Security began to sell and service cars at the location

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

formerly occupied by 40 West. The plaintiff below, Wayne Hughes (Hughes), was employed by Security as its operating manager.

[*115] Rottman, who continued to experience problems with her car, brought it to Security for service. Although neither Security nor Hughes had sold the car to Rottman, and the car's warranty had expired, Hughes obtained special authorization from AMC to perform warranty service. Security made four attempts to repair the car, the last of which occurred on 29 June 1977. After this repair, a test drive was made by an investigator from the Maryland Department of Transportation who reported that "the vehicle operated properly" and that "no problem could be observed." On 22 July 1977, the car's[***7] engine cut out, and the car never again functioned.

Dissatisfied with the service she had received from AMC and Security, Rottman complained to a large number of government agencies, consumer help groups, newspapers, and television stations, including WBAL-TV, owned by the petitioner, The Hearst Corporation (Hearst). As part of its public affairs programming, WBAL broadcast short filmed commentaries by, inter [*488] alia, members of the public who had requested to appear.

On 29 September 1977, WBAL-TV broadcast a videotape of Rottman making the following complaint:

"Dawn Rottman: Viewers please bear with me while I read the following letter. If after I'm through, any of you have any suggestions, please send them to 1211 Cleveland Street, Baltimore, Maryland 21230.

Dear Mr. Wayne Hughes:

Hi Mr. Hughes. I'm sure that you know who I am. Just think a minute and you'll get it. I'm the lady who has been trying for two years to get my car running properly. And you Mr. Dick, how are you tonight. Remember when I bought my new 1975 AMC Matador on July 9, 1975 and was explained your great buyer protection plan. Now I ask, what [*116] protection? It[***8] surely isn't against an engine that cuts out at various speeds without warning is it? Let me see, August the 27th, 1975 when the car only had 872 miles on it was the first trip to the service center concerning this. June 28, 1977 when the car had approximately 14,500 miles on it was the 19th trip for the same problem and guess what? On July 22, 1977 the engine cut out and the car hasn't run since. I mean what should I expect for \$5,093.16. A miracle? No just the car that runs. After all it has power steering and power brakes and you know that when you are doing, going down a highway doing 55 miles per hour and the engine cuts out that I can't steer or stop the car. You don't know the fun of playing dodge-um cars with three children in the back seat on the beltway and all you viewers, guess what? I have to go to court to try to get out of this death trap and get a car instead of a toy that plays with peoples' lives from AMC. Mr. Hughes, here's one person you could offer a camera and calculator to and I still wouldn't buy another AMC product."

As described by the court, Rottman explained that she "made her comments concerning Hughes because she considered Hughes to[***9] be the owner of the Security dealership, and she wanted everyone who would listen to her to know that Hughes was responsible for the difficulties she had experienced with her car."

On 14 July 1978 Hughes, alleging defamation, sued Hearst. On 29 March 1982, in a written opinion issued after a bench trial, the trial court found that Rottman's statement was defamatory, because it disparaged Hughes' conduct in his trade, business or employment. Additionally, the trial court found that Rottman's statement was false, because Hughes had not sold Rottman the car and, therefore, "it was not Hughes who put Rottman in a 'death trap.' He had no connection whatever with the 1975 sale of the vehicle to [*117] Rottman, nor with 15 of the 19 alleged trips 'for the same problem.'" Moreover, the trial court found that after the last such repair, the vehicle had operated properly. n2 The trial court further found that Hearst had been negligent in broadcasting the statement.

-----Footnotes-----

n2 Hearst does not contend that the statement was not false and defamatory. For purposes of this appeal we accept the trial court's conclusion, without expressing any opinion on that aspect of the case.

-----End Footnotes-----

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

[***10]

On the damage aspect of the case the trial court found

"no out-of-pocket loss sustained by Hughes. Nor [was] there any evidence of impairment of reputation."

The trial court was "persuaded, however, that the publication did produce personal humiliation and mental anguish," for which compensatory damages in the amount of \$2,500 were awarded.

Hearst appealed, and while that appeal was pending, Hearst petitioned for certiorari. We granted the writ before the appeal had been considered by the Court of Special Appeals.

Hearst contends that the trial court erred in awarding damages for emotional distress without proof that the broadcast impaired [**489] Hughes' reputation. The exclusive foundation for Hearst's argument is Maryland common law. It is Hearst's position that, following *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), this Court has not defined the "actual injury" for which recovery will be allowed, absent proof of constitutional malice. We are invited to use *Gertz* as the occasion for requiring, as a matter of state law, that actual harm to reputation be proved before any compensatory damages for any harm[***11] may be awarded. The rule Hearst seeks is not Maryland law, and we decline to adopt it as Maryland law.

[*118] I

A.

The subject legal issue lies in a corner of the law of defamation. To locate the issue in relation to the rules surrounding it, we must sketch common law defamation, federal constitutional developments and recent changes in the Maryland common law, insofar as they relate to the instant case. Unfortunately terms like "injury," "actual injury," "damage" and "harm" are used in different decisions, and often within the same decision, to represent different concepts. We shall use the following terms as defined in Restatement (Second) of Torts (Restatement).

"Injury" means "the invasion of any legally protected interest of another." § 7 (1).

"Harm" means "the existence of loss or detriment in fact of any kind to a person resulting from any cause." § 7 (2). (Emphasis added.)

"Damages" mean "a sum of money awarded to a person injured by the tort of another." § 12A.

For purposes of the instant appeal, the words published by Hearst were actionable per se at common law. No extrinsic facts were relied upon to demonstrate the defamatory nature of the statement. [***12] We need not determine whether broadcasting of a defamatory oral statement over television is libel or slander. The trial court viewed the statement as ascribing conduct to Hughes that would adversely affect his fitness for the proper conduct of his business, and that aspect of the ruling is not challenged here. [HN3] As either libel or slander, such words are actionable per se at common law. See, e.g., *Fennell v. G.A.C. Finance Corp.*, 242 Md. 209, 218-221, 218 A.2d 492, 497-98 (1966); *Heath v. Hughes*, 233 Md. 458, 463-65, 197 A.2d 104, 106-107 (1964); *Pollitt v. Brush-Moore Newspapers, Inc.*, 214 Md. 570, 577, 136 A.2d 573, 577 (1957); *Newbold v. Bradstreet*, 57 Md. 38, 52-53 (1881); Restatement, §§ 569 and 573.

[HN4] Under pre-*Gertz* law, the fact finder in a defamation action predicated on words actionable per se was permitted [*119] to assess general damages for the presumed harm to reputation. See generally *Fennell v. G.A.C. Finance Corp.*, supra; *Thompson v. Upton*, 218 Md. 433, 146 A.2d 880 (1958); *Evening News Co. v. Bowie*, 154 Md. 604, 141 A. 416 (1928); *Bowie v. Evening News*, 148 Md. 569, 129 A. 797 (1925); *Kilgour v. Evening Star Co.*, 96 Md. [***13] 16, 53 A. 716 (1902); *Gambrill v. Schooley*, 93 Md. 48, 48 A. 730 (1901). One reason was that "[i]n the case of words or conduct actionable per se, their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved." *M & S Furniture v. De Bartolo Corp.*, 249 Md. 540, 544, 241 A.2d 126, 128 (1968). See also *Murnaghan, Ave Defamation, Atque Vale Libel and Slander*, 6 U. of Balt. L. Rev. 27, 35 (1976). Further, at common law, the defamatory statement was viewed to be presumptively false. Truth

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***, 9 Media L. Rep. 2504

was an affirmative defense so that the initial burden of proving falsity did not rest upon the plaintiff. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 597, 350 A.2d 688, 698 (1976).

If we use the term "defamatory publication" for published words, actionable per se, that at common law carry a presumption of harm to reputation, we may state [HN5] the common law rule, for cases not involving punitive [**490] damages or questions of privilege, as follows:

Common Law rule:

Where P is any person and D is any person, then

defamatory publication + falsity = cause of action for compensatory[***14] damages.

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) involved a publication that was libelous per se under Alabama common law. From this factor Alabama law implied harm and permitted damages without proof of harm. Id. at 262, 84 S. Ct. at 716, 11 L. Ed. 2d at 696. The presumed harm was to reputation. Id. at 267, 84 S. Ct. [*120] at 719, 11 L. Ed. 2d at 698. The Court held that [HN6] the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. We shall call these alternative standards of fault "constitutional malice." The *New York Times* rule was extended to plaintiffs who are public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). In *Jacron*, supra, 276 Md. at 591-92, 350 A.2d at 694-95, we expressed the view that *New York Times* is not limited to media defendants. [***15] Thus we have [HN7] the

New York Times/Butts rule:

Where P is a public figure and D is any person, then

defamatory publication + falsity + fault by constitutional malice standard = constitutionally permissible state cause of action for compensatory damages (punitive damages also permitted).

Gertz dealt with a plaintiff who was not a public figure and with a defendant engaged in media expression. Three constitutionally based safeguards were erected for such a defendant. First, [HN8] there may be no "liability without fault, [but] the States may define for themselves the appropriate standard of liability" *Gertz*, supra, 418 U.S. at 347, 94 S. Ct. at 3010, 41 L. Ed. 2d at 809. Secondly, there may be no compensatory damages without evidence of actual harm. Presumed harm to reputation is insufficient. The language of the Supreme Court was:

[*121] The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial[***16] sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.

....

It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury [**491] is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. [418 U.S. at 349-50, 94 S. Ct. at 3011-3012, 41 L. Ed. 2d at 810-11 (emphasis added).]

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***, 9 Media L. Rep. 2504

Thirdly, Gertz held that the private defamation plaintiff who did not establish fault by the constitutional malice standard could not recover punitive damages. [***17] The reasoning was based on the second holding which had prohibited compensatory damages based on presumed harm to reputation in negligent defamation cases. From the standpoint of the dangers of media self-censorship, the Court likened jury discretion to award punitive damages to "the doctrine of presumed damages" 418 U.S. at 350, 94 S. Ct. at 3012, 41 L. Ed. 2d at 811.

[*122] Although the injury to reputation, recognized by state defamation law, carried a presumption of harm to reputation, Gertz proscribed the award of general damages for presumed harm (called "presumed damages" at times in Gertz). Compensatory damages may be awarded for harm (i.e., for loss or detriment in fact and called "actual injury" at times in Gertz). However, under Gertz compensable harm is not limited to harm to reputation. Nor did Gertz state that harm to reputation must first be found before damages for other types of harm, e.g., emotional distress, could be awarded. And so we have [HN9] the

Gertz rule:

Where P is a private person and D is engaged in media expression, then

defamatory publication + falsity + fault by a standard less than constitutional [***18]malice + harm = constitutionally permissible cause of action for compensatory damages (punitive damages not allowed).

In Jacron, this Court held that, under Maryland law, the "rules announced in Gertz apply to cases of libel and slander alike brought against non-media defendants," and that the standard of fault would be negligence. 276 Md. at 594, 596-97, 350 A.2d at 696, 697-98. Thus there is [HN10] the

Jacron rule:

Where P is a private person and D is any person, then

defamatory publication + falsity + fault by negligence standard + harm = Maryland cause of action for compensatory damages (punitive damages not allowed).

[*123] Following Jacron, the Court of Special Appeals in *IBEW, Local 1805 v. Mayo*, 35 Md. App. 169, 370 A.2d 130 (1977), opined on the very issue presented in the instant matter. A supervisor at an industrial plant claimed that he had been defamed in the union newsletter. Judgment went for the supervisor for \$1.00 compensatory damages and \$5,000 punitive damages. On appeal, the union contended "that the sine qua non in a defamation case is evidence of actual damage to reputation, and that no other element of damage may [***19] be considered unless it is shown to flow from the proven damage to reputation." *Id.* at 179, 370 A.2d at 135. Judge Powers, writing for the intermediate appellate court, pointed out that the case was one of libel per se in which [**492] harm to reputation is presumed. *Id.* After stating the rule from Gertz, it was held that there was sufficient evidence to support an award of compensatory damages, because the jury could have found that the plaintiff "suffered actual injury, at least to the extent of personal humiliation, embarrassment, and mental anguish and suffering." *Id.* at 180, 370 A.2d at 136. On certiorari review this Court affirmed, but on a different ground. Because the jury had been instructed that it had to find fault by the constitutional malice standard, the award of punitive damages would not be set aside. *IBEW, Local 1805 v. Mayo*, 281 Md. 475, 379 A.2d 1223 (1977). With respect to compensatory damages, the union's argument in *Mayo*, that harm to reputation is prerequisite, was made solely on the constitutional level. But, because the plaintiff had established constitutional malice, we held that compensatory damages were allowable, even if [***20] based upon presumed harm to reputation. As to the issue presented in the case at hand, we said (281 Md. at 482 n.4, 379 A.2d at 1227 n.4):

Since the union does not attempt to argue that, constitutional considerations aside, state law would nevertheless have barred the damage award returned here, we do not reach that question.

Our opinion in *Mayo* also reasoned, at the constitutional level, from *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. [**124] 958, 47 L. Ed. 2d 154 (1976), a case arising out of Florida. The plaintiff, who was not a public figure, had, prior to trial, withdrawn any claim for damages for harm to reputation. Damages were awarded for emotional distress. In holding that state law may permit such damages in negligent defamation, the Supreme Court rejected, as a matter of

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***, 9 Media L. Rep. 2504

constitutional law, the argument which Hearst advances to us. The Court reasoned as follows (424 U.S. at 460, 96 S. Ct. at 968, 47 L. Ed. 2d at 166):

Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with Gertz. Petitioner's theory seems to be that the only compensable[***21] injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

[*125] Accordingly, we may frame [HN11] the

Firestone rule:

Where P is a private citizen and D is engaged in media expression, then

defamatory publication + falsity + fault by negligence standard + harm by way [***22]of emotional distress without proof of harm to reputation = constitutionally permissible cause of action for compensatory damages (punitive damages not allowed).

[**493] The analogy that this Court in *IBEW, Local 1805 v. Mayo*, supra, drew to Firestone was that "[HN12] if the absence of injury [harm] to reputation will not prevent an award of compensatory damages where mere negligence is established, it will not do so where, as here, the New York Times standard of malice is met." 281 Md. at 482, 379 A.2d at 1227. While in both *Mayo* and *Firestone* the plaintiffs introduced some evidence of harm by way of emotional distress, and while such evidence satisfies constitutional standards in a negligent defamation case, this Court did not have to consider that aspect in *Mayo*. Because a "defamatory publication" gives rise to a common law presumption that reputation has been harmed, and because the United States Constitution does not prohibit awarding damages for that presumed harm in a constitutional malice case, the \$1.00 compensatory damages in *Mayo* were sustained as damages for harm to reputation, absent proof of harm to reputation, as a matter of state law. [***23]

Mayo recognizes that, [HN13] as a matter of Maryland law, the presumption of harm to reputation still arises from the publication of words actionable per se. A trier of fact is not constitutionally barred from awarding damages based on that presumption in a constitutional malice case. A trier of fact is constitutionally barred from awarding damages based [*126] on that presumption in a negligent defamation case. But *Gertz* does not constitutionally bar awards of damages based on proven harm. Nothing in present Maryland law bars awards of damages based on proven harm. Under Maryland common law as constitutionally modified, the trial court did not err in granting judgment in favor of Hughes.

B.

The foregoing review brings us to the corner of defamation law where the issue lies. Hearst essentially seeks a change in Maryland law, when it argues that proof of harm to reputation is essential to negligent defamation. What Hearst asks us to rule is that, if harm to reputation is not proved, then the case does not involve harm to reputation, and there is no actionable defamation. In other words, Hearst would scuttle the common law presumption of harm to reputation from words[***24] actionable per se.

Hearst says that, absent harm to reputation, there may be a tort, but it is not the tort of defamation. This analysis is presented in *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975). That article appeared before the Supreme Court's decision in *Firestone* was handed down. *Eaton* said:

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

Negligent infliction of mental distress by publishing a falsehood may well be a tort, but it is not the tort of defamation. Defamation is injury to reputation. If the essence of the law of defamation is to be preserved in the wake of the Court's destruction of the conclusive presumption of injury, a defamation plaintiff must first prove impairment of reputation before he is entitled to recover for personal humiliation and mental anguish and suffering. [Id. at 1438-39. (Footnote omitted.)]

While the modern tort of intentional infliction of severe emotional distress seeks to protect freedom from emotional [*127] distress, it is not exclusive in that regard. Defamation historically has "accorded substantial legal protection, within limited areas, to the [interest] [***25] in freedom from emotional distress," as well as to the interest in freedom from invasion of privacy. L. Eldredge, *The Law of Defamation* § 2, at 3 (1978). But primarily defamation "has been traditionally regarded as that part of tort law which protects the interest of a person in his reputation, i.e., his good name." Id. at 2. Absent defamatory words of some type there is no tort of defamation. But here there is a publication of false and defamatory matter from which harm to reputation is presumed. The tort is defamation even though the harm proven to satisfy Gertz is emotional distress.

[**494] Another difficulty with Hearst's position is that it proves too much. In *IBEW, Local 1805 v. Mayo*, we sustained the award of \$1.00 in compensatory damages even though there was no proof of harm to reputation. That was a defamation action. It did not become some other tort because harm to reputation was not proved. It is true that in *Mayo* fault was established by the constitutional malice standard, while in the case at bar the standard met was negligence. This distinction goes to the degree of the defendant's fault and to damages, not to whether the cause[***26] of action is one for the protection of the interest in freedom from harm to reputation.

Further, proof of harm to reputation is not considered by a number of treatises to be essential to an action in negligent defamation. This is reflected by the view taken of the status, after Gertz, of nominal damages in such actions. The Restatement, § 620 adopts the position that "[o]ne who is liable for a slander actionable per se or for a libel is liable for at least nominal damages." Comment c to that section recognizes that a constitutional question is involved, but concludes that "[i]t seems likely that the constitutional restriction will be confined to preventing the awarding of the common law 'presumed damages' without proof as to what the damages are." L. Eldredge, *The Law of Defamation* § 95.b, at 541 and R. Sack, *Libel, Slander, and Related Problems* [*128] § VII.2.1, at 345 (1980) take the same position. Comment a to Restatement, § 620 describes the types of situations in which it believes nominal damages will lie.

Nominal damages are awarded when the insignificant character of the defamatory matter, or the plaintiff's bad character, leads the jury[***27] to believe that no substantial harm has been done to his reputation, and there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation. They are also awarded when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character

Comment b states that the rule applies when the defamatory words are actionable per se. Inasmuch as these authorities would allow a judgment for the plaintiff, albeit for nominal damages, in cases in which no harm at all has been proven, they do not view proof of harm to reputation as an essential element of the tort. A fortiori these same authorities would allow judgment for the plaintiff in a case of per se defamation where harm is proven, by way of emotional distress, without proof of harm to reputation.

Our comparison to the A.L.I. treatment of nominal damages requires reference to *Metromedia, Inc. v. Hillman*, 285 Md. 161, 172, 400 A.2d 1117, 1123 (1979). There we held that [HN14] a declaration in libel must contain, inter alia, "allegations of damages with some particularity, since Gertz and Jacron forbid [***28] presumed damages." That case did not directly present whether a plaintiff may use defamation in Maryland solely to vindicate reputation, i.e., as a vehicle to obtain a judicial determination, through the award of nominal damages, that the words were false. However, we said in *Metromedia* that "[s]ince nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod." 285 Md. at 163, 400 A.2d at 1119. Later in that opinion we spoke of nominal [*129] damages as being prohibited where their imposition would be a form of liability without fault ("Since under Gertz we were no longer permitted to impose liability on the media without fault, as, e.g., by permitting recovery of nominal damages for calling a person a thief, and since where the New York Times test of reckless falsity was not met, presumed or punitive damages were no longer permitted, it became necessary [in Jacron] to frame new rules."). 285 Md. at 168, 400 A.2d at 1121. We need not

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

decide in the instant matter the status of nominal damages after Gertz, either constitutionally[***29] or under Maryland law. The quoted concern expressed [**495] in *Metromedia* was only with respect to the award of damages based on presumed harm. In the instant matter, the damages awarded were for proven emotional distress. Just as the A.L.I. position on nominal damages reflects that the common law presumption of harm to reputation from the negligent publication of words both false and actionable per se is sufficient to make out the tort of defamation, so here those same factors are sufficient to constitute defamation, with, instead of nominal damages, damages based on proven harm.

We are directed by *Hearst* to the recent decision of the Supreme Court of Kansas in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239, 1243 (1982), where that court adopted the rule that "[u]nless injury to reputation is shown, [a] plaintiff has not established a valid claim for defamation" This approach, in our view, fails to respect the centuries of human experience which led to a presumption of harm flowing from words actionable per se. One reason for that common law position was the difficulty a defamation plaintiff has in proving harm to reputation. *Eaton*, supra[***30], at 1357 describes the problems:

The conclusive presumption of injury for certain kinds of defamation derives from the recognition that injury to reputation is extremely difficult to demonstrate, even when it is obvious that serious harm has resulted. Identifying and locating those persons in the community who may think less [*130]highly of the plaintiff because of the publication is difficult, especially when the defamatory statement has been indiscriminately circulated. And once located, it is the rare witness who will admit to the plaintiff or testify in court that his attitudes toward the plaintiff have changed as a result of the publication, when by doing so he admits that he changed his opinion without determining the truth or falsity of the statement.

Ordinarily, the plaintiff will be able to present witnesses who will testify only that the plaintiff's reputation had been good, that their own opinion of the plaintiff has not changed, but that the plaintiff's general reputation in the community has suffered as a result of the publication. This kind of testimony often lacks credibility because it is bottomed on hearsay and imputes to others a change in attitude[***31] which the witnesses themselves thought unnecessary. And this kind of evidence is usually insufficient to establish the necessary causal connection between the defamatory publication and the alleged decline in community standing. In short, a requirement of actual proof of injury to reputation has always been thought to reduce considerably any chance for adequate compensation. [Footnote omitted.]

Defendants in negligent defamation cases are protected by the prohibition against liability without fault. They have no exposure to punitive damages. There is no exposure to general damages based on presumed harm. With the possible exception of nominal damages, compensatory damages are limited to compensation for harm proven and found as a fact. Victims of defamation can reasonably become genuinely upset as a result of the publication. If such persons can convince a trier of fact that their emotional distress is genuine and can prove the other common law and constitutionally required elements of a negligent defamation case, we see no social purpose to be served by [*131] requiring the plaintiff additionally to prove actual impairment of reputation.

II

Hearst also contends[***32] there is an absolute privilege for the publication of opinions which disclose the facts upon which they are based and that that privilege applies here. The argument's origin is a passage in *Gertz*, supra, 418 U.S. at 339-340, 94 S. Ct. at 3007, 41 L. Ed. 2d at 805 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of [**496] other ideas. But there is no constitutional value in false statements of fact." [Footnote omitted.]). Cited to support the proposition are various federal appellate opinions n3 and Restatement, § 566, which reads: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

-----Footnotes-----

n3 *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), cert. denied sub. nom., *Hotchner v. Doubleday & Co.*, 434 U.S. 834; *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

297 Md. 112, *; 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

-----End Footnotes-----

***33]

The Restatement distinguishes between "pure" and "mixed" opinions. *Id.* at comment b. A "pure" opinion is one in which the speaker discloses the facts on which he bases his opinion of the plaintiff, while a "mixed" opinion is one which, "while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant" *Id.* Comment c to § 566 states that a defamation action may not be maintained for a "pure" opinion, no matter how unjustifiable, derogatory or vituperative the opinion may be.

In an effort to bring itself under the rule on which it relies, Hearst treats the publication as not applying to the plaintiff Hughes. In its brief Hearst says that "it is clear that Rottman was expressing her opinion about AMC's product [*132] and the Buyer Protection Plan." Rottman is said to have been expressing her opinion that AMC's car was a deathtrap and a toy. Because she explained the facts underlying her opinion, i.e., the date she bought the car, the fact that it malfunctioned and her attempts to have it repaired, Hearst claims we are dealing with a "pure" opinion.

There is no indication[***34] of any contention in the trial court that the statements were not of and concerning Hughes. The trial court specifically found Rottman's statements to be "patently false as applied to Plaintiff Hughes." Section 566, comment c points out that liability may attach for false and defamatory factual statements underlying pure opinion, when it states:

[T]he effect of the rule that there can be no recovery in defamation for a pure expression of opinion can be set forth by applying it to four fact patterns:

(1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for his expression of opinion.

See also *Hoover v. Peerless Publications, Inc.*, 461 F. Supp. 1206 (E.D. Pa. 1978); *Rand v. New York Times*, 75 A.D.2d 417, 422, 430 N.Y.S.2d 271, 274 (1980) (dicta). Thus, even if § 566 reflects Maryland law, as Hearst contends, this case is not within that rule.

Judgment of the Circuit Court for Howard County affirmed.

Costs to be paid by The Hearst Corporation.

DISSENTBY: DAVIDSON

DISSENT:

Davidson, J., dissenting:

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), the United States Supreme Court established as [*133] a constitutional requirement that, in order to recover damages in a defamation action, a public figure must prove that a false defamatory statement "was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 279-80, 84 S.Ct. at 726. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974), the Supreme Court determined that the *New York Times* standard does not apply when a private individual seeks to recover damages for a false defamatory statement. There, that Court held that under such circumstances, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability." *Gertz*, 418 U.S. at 347, 94 S.Ct. at 3010.

[**497] In allowing a lesser standard of liability, the Supreme Court recognized that private individuals who have not "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" are entitled to a greater degree of protection[***36] than public figures. *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3010. The Supreme Court further recognized that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Gertz*, 418 U.S. at 349, 94 S.Ct. at 3011-12. Accordingly, the Supreme Court held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of

297 Md. 112, *; 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

knowledge of falsity or reckless disregard for the truth." Gertz, 418 U.S. at 349, 94 S.Ct. at 3011. In explicating this holding, the Supreme Court said:

"It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket [*134] loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood [***37] include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." Gertz, 418 U.S. at 349-50, 94 S.Ct. at 3012 (emphasis added).

In *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), this Court considered the appropriate standard of fault to be applied when a private individual seeks to recover damages for a false defamatory statement. In reviewing the historical evolution of the Gertz standard, this Court said:

"The Supreme Court, with a majority of five, held that the constitutional privilege articulated in *New York Times* does not extend to defamatory falsehoods concerning an individual who is neither a public official nor a public figure. Rather than expand the *New York Times* standard to falsehoods relating to private persons when made in connection with events of public interest, as the *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S. Ct. 1811 (1971)[***38] plurality had done, the Court applied a number of restrictions to the law of libel designed to accommodate freedom of the press with the state's interest in protecting a private person's reputation. The Court held that in cases of defamation of private persons (1) the state may not impose liability without fault, but with that limitation may adopt any other standard of media liability, and (2) in cases where the *New York Times* test of knowing or reckless falsity is not met, the state may permit recovery for 'actual injury' but not presumed or punitive damages. Such 'actual injury' [*135] was not confined to out-of-pocket loss, but may include 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'" *Jacron Sales Co.*, 276 Md. at 587, 350 A.2d at 692 (emphasis added).

This Court held that in Maryland a negligence standard was to be applied. Moreover, this Court said:

"Unless a conditional privilege is found to have existed, the plaintiff shall be required at the new trial of this case to establish the liability of the defendant through proof of negligence by the preponderance of the evidence, and may [***39] recover compensation for actual injury, as defined in Gertz and outlined earlier, but neither presumed nor punitive damages, unless he establishes liability under the more demanding *New York Times* standard of knowing falsity or reckless disregard [**498] for the truth." *Jacron Sales Co.*, 276 Md. at 601, 350 A.2d at 700 (emphasis added).

Thus, this Court indicated that in a negligent defamation action, once a right to recover has been established, recoverable damages are limited to compensation for proven actual injury, such as impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering, resulting out-of-pocket loss, or any other resulting loss. Presumed or punitive damages cannot be recovered. The question whether Maryland law requires proof of a specific type of actual injury -- impairment of reputation -- in order to establish a right to recover was not raised, considered, or determined by this Court.

In *International Brotherhood of Electrical Workers, Local 1805, AFL-CIO v. Mayo*, 281 Md. 475, 379 A.2d 1223 (1977), this Court stated that in a negligent defamation action federal constitutional law did[***40] not require proof of impairment of reputation in order to establish a right to recover damages for actual injury, including damages for impairment of reputation, emotional distress, resulting [*136] out-of-pocket loss, or any other resulting loss. However, this Court additionally said:

"Appellant's sole contention here is that federal constitutional law precluded the damages [for emotional distress] awarded appellee, absent proof of actual injury to his reputation. Since the union does not attempt to argue that, constitutional considerations aside, state law would nevertheless have barred the damage award returned here, we do not reach that question." *Mayo*, 281 Md. at 482 n.4, 379 A.2d at 1227 n.4.

297 Md. 112, *; 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

Thus, this Court explicitly left undetermined the question here, whether in a negligent defamation action Maryland law requires proof of impairment of reputation in order to establish a right to recover damages for emotional distress.

In *Metromedia, Inc. v. Hillman*, 285 Md. 161, 400 A.2d 1117 (1979), this Court considered the question whether subsequent to *Gertz* Maryland law continued to recognize any distinction between libel per se and libel per [***41] quod. This Court held that the only remaining distinction is that in an action for libel per quod, a private individual must allege and prove extrinsic facts showing that the publication is defamatory, whereas in an action for libel per se, no such allegation and proof is necessary. In reaching its result, this Court articulated what it then considered to be the minimal standard of pleading and proof in a defamation action. There, this Court said:

"Suffice it to say the effect in Maryland of *Gertz* and *Jacron* is that in order for a declaration alleging libel in a Maryland court to withstand the test of a demurrer it must allege:

"(1) a false and defamatory communication

a -- which the maker knows is false and knows that it defames the other, or

b -- that the maker has acted in reckless disregard of these matters, or

[*137] c -- that the maker has acted negligently in failing to ascertain them, and

"(2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory, and

"(3) allegations[***42] of damages with some particularity, since *Gertz* and *Jacron* forbid presumed damages.

In other words, as to (3) in Maryland a pleading to be sufficient must show a basis for believing that the plaintiff has sustained actual injury as defined in *Jacron*." *Metromedia, Inc.*, 285 Md. at 171-72, 400 A.2d at 1123 (emphasis added).

The minimal standard expressed in (3) above was nothing more than a reiteration of the principle expressed in *Jacron* - that once a right to recover has been established, recoverable damages are limited to compensation for proven actual injury and that presumed or punitive damages cannot be recovered. That standard indicated only that, in the wake of *Gertz* and *Jacron*, it [***499] was necessary not only to plead and prove a right to recover, but also to plead and prove a recoverable damage -- actual injury. Moreover, although the minimal standard expressed in (3) did not restrict the type of actual injury required to be pleaded and proven to impairment of reputation, this Court nonetheless did not determine the question here, whether under Maryland law it is necessary to prove impairment of reputation in order to establish[***43] a right to recover, because that question was neither raised nor considered. Under these circumstances, the question not reached in *Mayo* or *Metromedia, Inc.*, whether, in a negligent defamation action, it is necessary to prove impairment of reputation in order to establish a right to recover, remains to be determined here.

The majority here concludes that under Maryland law proof of harm to reputation is not essential to an action in [*138] negligent defamation. Even a cursory examination of the majority's lengthy but sophisticated analysis reveals that its conclusion is not affirmatively supported by any direct authority.

The majority relies essentially upon an analogy premised upon the post-*Gertz* position of Restatement (Second) of Torts § 620 (1977) (Restatement) on nominal damages. n1 Section 620 of the Restatement does, after *Gertz*, retain the previous common law rule that "[o]ne who is liable for a slander actionable per se or for a libel is liable for at least nominal damages." However, § 569 comment c of the Restatement explicitly states that "[t]he constitutionality of the common law rule that nominal damages may be recovered for a defamatory [***44]communication that is actionable per se, even in the absence of proof of harm to reputation, is now somewhat uncertain." Thus, the Restatement itself acknowledges that in the wake of *Gertz* its stated common law rule may no longer be constitutionally viable.

-----Footnotes-----

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

n1 In addition to § 620 of the Restatement, the majority cites only two other treatises -- L. Eldredge, *The Law of Defamation* § 95.b, at 541 (1978) and R. Sack, *Libel, Slander, and Related Problems* § VII.2.1, at 345 (1980). Both of these treatises do virtually nothing other than quote extensively from and rely upon the Restatement.

-----End Footnotes-----

More important, the Restatement's post-Gertz view with respect to the continued existence of nominal damages is directly contrary to post-Gertz statements made by this Court, albeit in dicta, in *Metromedia*. There, writing for a unanimous Court, Judge Smith on two separate occasions unequivocally and without qualification stated that in the wake of Gertz nominal damages for a defamatory communication[***45] that is actionable per se no longer exist in Maryland. Thus, Judge Smith initially specifically said:

"Since nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod." *Metromedia, Inc.*, 285 Md. at 163, 400 A.2d at 1119 (emphasis added).

[*139] Subsequently, Judge Smith even more specifically said:

"[U]nder Gertz we were no longer permitted to impose liability on the media without fault, as, e.g., by permitting recovery of nominal damages for calling a person a thief. . . ." *Metromedia, Inc.*, 285 Md. at 168, 400 A.2d at 1121 (emphasis added).

Manifestly, the Restatement's post-Gertz rule on nominal damages is not only considered by the Restatement itself to be of questionable constitutional validity, but is also of questionable validity under present Maryland law. Under such circumstances, an analogy premised upon that rule can hardly provide adequate affirmative support to justify the majority's conclusion that under post-Gertz Maryland law it is not necessary to prove impairment[***46] of reputation in order to recover in a negligent defamation action.

Moreover, in my view, the majority's conclusion not only is antithetical to Maryland's historical concept of the nature and purpose of defamation actions, but also creates [*500] an internal inconsistency within Maryland tort law. Courts have long recognized that the gravamen as well as the fundamental purpose of defamation actions is to permit recovery for impairment of reputation. As long ago as 1605, in *The Case of de Libellis famosus; or of Scandalous Libels*, 5 Coke 125 (1605), it was reported:

"He who kills a Man with his Sword in Fight is a great Offender, but he is a greater Offender who poisons another; for in the one Case he, who is openly assaulted, may defend himself, and knows his Adversary, and may endeavour to prevent it: But poisoning may be done so secretly that none can defend himself against it; for which Cause the Offense is the more dangerous, because the Offender cannot easily be known; and of such Nature is libelling, it is secret, and robs a Man of his good Name, which ought to be more precious to him than his Life . . . and therefore when the Offender is known, he ought[***47] to be severely punished."

[*140] Similarly, in *Terwilliger v. Wands*, 17 N.Y. 54, 59, 6 N.Y.S.196, 197 (1858), the New York Court of Appeals said:

"The action for slander is given by the law as a remedy for 'injuries affecting a man's reputation or good name by malicious, scandalous and slanderous words, tending to his damage and derogation.' It is injuries affecting the reputation only which are the subject of the action." (Citations omitted) (emphasis added).

More recently, in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275, 91 S.Ct. 621, 627 (1971), the United States Supreme Court said:

"[D]amage to reputation is, of course, the essence of libel."

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

Commentators too have recognized that the gravamen as well as the fundamental purpose of defamation actions is to permit recovery for impairment of reputation. Thus, in W. Prosser, *Handbook of the Law of Torts* 737, 739 (4th ed. 1971), it is stated:

"[D]efamation is an invasion of the interest in reputation and good name. This is a 'relational' interest, since it involves the opinion which others in the community may have, or tend to have, of the plaintiff. Consequently[***48] defamation requires that something be communicated to a third person that may affect that opinion. Derogatory words and insults directed to the plaintiff himself may afford ground for an action for the intentional infliction of mental suffering, but unless they are communicated to another the action cannot be one for defamation, no matter how harrowing they may be to the feelings. Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except [*141] as an element of 'parasitic' damages attached to an independent cause of action.

...

Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." (Footnotes omitted) (emphasis added).

Recognizing that the gravamen of the tort of defamation is impairment of reputation, courts in some jurisdictions have held, after Gertz, that in a negligent defamation action it is necessary to prove impairment of reputation in order to establish a right to recover damages for emotional distress. See, e.g., *Gobin* [***49] v. *Globe Publishing Co.*, 232 Kan. 1, 6, 649 P.2d 1239, 1243 (1982); *France v. St. Clare's Hosp. & Health Center*, 82 A.D.2d 1, 6, 441 N.Y.S.2d 79, 83 (1981); *Salomone v. MacMillan Publishing Co.*, 77 A.D.2d 501, 502, 429 N.Y.S.2d 441, 442 (1980). But see, e.g., *Firestone v. Time, Inc.*, 305 So.2d 172, 176 (Fla. 1974), vacated on other grounds, 424 U.S. 448, 96 S.Ct. 958 (1976); *Freeman v. Cooper*, 390 So.2d 1355, 1360 (La.App. 1980), aff'd, 414 So.2d 355 (La. 1982). Thus, in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 6, 649 P.2d 1239, 1243 (1982), the Supreme Court of Kansas said:

"[**501] We conclude that in this state, damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law. It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander." (Emphasis added.)

[*142] The rationale underlying the concept that impairment of reputation must be proven in order to establish a right to recover damages for a false[***50] defamatory statement was stated as long ago as 1858 in *Terwilliger*, 17 N.Y. at 60-61, 6 N.Y.S. at 197-98. There the Court of Appeals of New York explained why, in a defamation action, humiliation and mental anguish are not, in and of themselves, sufficient to establish a right to recover. There, that Court said:

"It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable per se, both as to the words and the kind of damages; and a clear and wise one has been fixed by the[***51] law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss." (Emphasis added.)

I agree with those courts that now require proof of impairment of reputation in order to establish a right to recover in a negligent defamation action.

[*143] In Maryland, this Court has frequently recognized that the gravamen of the tort of defamation is impairment of reputation. *Bowie v. Evening News*, 148 Md. 569, 572, 129 A. 797, 798 (1925); *Goldsborough v. Orem & Johnson*, 103

297 Md. 112, *, 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

Md. 671, 680, 64 A. 36, 39 (1906); *Negley v. Farrow*, 60 Md. 158, 175 (1883). Thus, in *Goldsborough v. Orem & Johnson*, 103 Md. 671, 680, 64 A. 36, 39 (1906), this Court said:

"Unjustifiable assaults upon private character are most detestable, and in many instances are treated by the Courts as actionable wrongs, and sometimes are punished as criminal offenses. 'Reputation and honor are no less precious to good men than [***52] bodily safety and freedom. In some cases they are dearer than life itself. It is needful for the peace and welfare of a civilized commonwealth that the laws should protect the reputation as well as the person of the citizen. In our law some kinds of defamation are the subject of criminal proceedings, as endangering public order or being offensive to public decency or morality. Vice Chancellor Malins in *Dixon v. Holden*, L.R. 7 Eq. 492, declared a man's reputation to be his property, and, if possible, more valuable than any other property. Chief Justice Best in *DeCrespigny v. Wellesly*, 5 Bing. 406, said that, if we reflect upon the degree of suffering occasioned by the loss of character, and compare it with the loss of property, the amount of the former injury far exceeds the latter. It was said by Fortescue, J., in *Button v. Hayward*, 8 Mod. that 'it was the rule of Holt, Chief Justice, to make words actionable whenever they sound to the disreputation of the person of whom they were spoken, and this was also Hale's and Twisden's rule, and I think a very good rule.'

[**502] "It is therefore the duty of everyone to forbear to speak, or write and publish false[***53] defamatory words of another, because he thereby commits a breach of duty which he owes to the other." (Additional emphasis added.)

[*144] Similarly, in *Bowie v. Evening News*, 148 Md. 569, 572, 129 A. 797, 798 (1925), this Court said:

"It may be stated generally that the right of the individual citizen to rest secure in the possession of his good name, fame and reputation is a valuable privilege, of which no one may deprive him through falsehood and malice without liability to him for the injury." (Emphasis added.)

Finally, this Court has traditionally defined as defamatory:

"[A]ny publication which tends to injure one's reputation, and expose him to hatred or contempt, if made without lawful excuse. . . ." *Negley v. Farrow*, 60 Md. 158, 175 (1883) (emphasis added).

Thus, this Court has recognized that the purpose of defamation actions is to permit recovery for impairment of reputation. It is consonant with that purpose to require proof of impairment of reputation in order to establish a right to recover in a negligent defamation action.

Moreover, to permit recovery for emotional distress in a negligent defamation action[***54] without proof of impairment of reputation would produce anomalous results. In *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349 (1975), Joel D. Eaton described the difficulties inherent in permitting recovery in a negligent defamation action without requiring proof of impairment of reputation. There, he suggested that the application of such a principle would "work considerable mischief in the law of defamation." He pointed out that if such a principle is applied in a defamation action, "the insult, not the injury is the cause of action," a result that would constitute "a fundamental change in the underlying premise of the tort itself." In explanation of this conclusion, he commented:

"Despite the myriad complexities in the common law, 'damage to reputation is, of course, the essence of libel.' A claim that one has been defamed is a [*145] claim that his reputation has been injured, not that a falsehood has been published about him; it is the damage and not the insult which is the cause of action. The common law maintained this theoretical underpinning by presuming injury to reputation[***55]

...

Negligent infliction of mental distress by publishing a falsehood may well be a tort, but it is not the tort of defamation. Defamation is injury to reputation. If the essence of the law of defamation is to be preserved . . . a defamation plaintiff must first prove impairment of reputation before he is entitled to recover for personal humiliation and mental anguish and suffering." 61 Va.L.Rev. at 1437, 1438-39 (footnotes omitted) (emphasis added).

297 Md. 112, *; 466 A.2d 486, **;
1983 Md. LEXIS 296, ***; 9 Media L. Rep. 2504

There is still another difficulty inherent in the application of a principle permitting recovery in a negligent defamation action without proof of impairment of reputation. In Maryland, a cause of action for the intentional infliction of emotional distress exists. In such an action, damages for emotional distress ordinarily can be recovered without showing any physical injury. *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977). In Maryland, a cause of action for the negligent infliction of emotional distress also exists. However, where the only damages sought result from the negligent infliction of emotional distress, damages ordinarily cannot be recovered without proof of physical injury, "as[***56] manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state." *Vance v. Vance*, 286 Md. 490, 500, 408 A.2d 728, 733 (1979); see *Bowman v. Williams*, 164 Md. 397, 404, 165 A. 182, 184 (1933). Thus, ordinarily, where the only damages sought result from the infliction of emotional distress [**503]and there is no proof of "physical injury," damages can be recovered only if an intentional tort is shown. To permit the recovery of damages for the infliction of emotional [*146] distress without proof of physical injury in a negligent defamation action is logically inconsistent with this general principle. It permits recovery for emotional distress resulting from a negligent act under circumstances ordinarily requiring an intentional rather than a negligent act.

In the wake of Gertz's and Jacron's elimination of presumed damages for impairment of reputation in negligent defamation actions, I am persuaded that in such actions, impairment of reputation must be proven in order to establish a right to recover. Such a result is mandated by Maryland's historical recognition that the fundamental purpose[***57] of defamation actions is to permit recovery for impairment of reputation. Additionally, to permit recovery for emotional distress in a negligent defamation action without proof of impairment of reputation would result in a fundamental change in the basic nature of the tort itself, a change that is antithetical to Maryland's historical recognition that the gravamen of the tort of defamation is impairment of reputation. Moreover, to permit recovery for emotional distress in a negligent defamation action under circumstances other than those ordinarily required in other types of negligence actions, creates an internal inconsistency within Maryland tort law.

In short, while federal constitutional law does not preclude recovery of damages for actual injury in a negligent defamation action despite the absence of proof of impairment of reputation, *Mayo*, 281 Md. at 482, 379 A.2d at 1227, in the wake of Gertz, I would hold that under Maryland law in a negligent defamation action it is ordinarily necessary to prove a specific type of actual injury -- impairment of reputation -- in order to establish a right to recover damages for emotional distress.

Here the record shows that in a[***58] negligent defamation action, Hughes proved emotional distress but failed to prove [*147] impairment of reputation. Under these circumstances, Hughes was not entitled to recover. I would reverse the judgment of the trial court. Accordingly, I respectfully dissent.

UNITED AUTO WORKERS, Local #5285, Plaintiff-Appellant, v. GASTON FESTIVALS, INCORPORATED,
Defendant-Appellee.
No. 94-1387

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

43 F.3d 902; 1995 U.S. App. LEXIS 382; 148 L.R.R.M. 2193

November 2, 1994, Argued
January 10, 1995, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Senior District Judge. (CA-93-338-3-P).

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff union appealed the judgment of the United States District Court for the Western District of North Carolina, which dismissed its action, brought pursuant to 42 U.S.C.S. § 1983, that alleged that its First Amendment rights were violated by defendant organizer. The district court dismissed the suit after holding that the organizer was not a state actor.

OVERVIEW: The organizer, a private enterprise, operated an annual festival and denied booth space to the union in accordance with its policy of avoiding controversial issues. The court agreed that the organizer did not engage in state action and therefore could not be held liable under 42 U.S.C.S. § 1983. The city did not confer upon the organizer sovereign power to the degree that the "government function" strand of the state action doctrine would allow the organizer to be held accountable as a state actor. The functions performed by the organizer were not those that were the exclusive prerogative of the city. The city government had not traditionally been the sole provider of community entertainment or the exclusive organizer of festivals and fairs. Further, the city did not cede control of the town center to the organizer because the organizer had not assumed all of the attributes of the city, nor had it performed the full spectrum of city powers. The city provided the permit, police protection, traffic control, fire protection, and water service to the festival. Finally, the permits themselves contained conditions that emphasized the city's retention of governmental authority.

OUTCOME: The court affirmed the dismissal of the union's complaint.

CORE TERMS: festival, state action, booth, park, street, state actor, public property, government function, space, annual, sidewalks, downtown area, distribute, civic, first amendment, public function, deprivation, organizer, reserved, qualify, parade, sovereign power, recreational, message, entity, governmental function, exclusive use, public park, prerogative, municipal

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN1] 42 U.S.C.S. § 1983 provides that every person, who under color of any statute, ordinance, regulation, custom, or usage, of any state subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Liability under § 1983 only extends to persons acting under color of law, a requirement

43 F.3d 902, *, 1995 U.S. App. LEXIS 382, **;
148 L.R.R.M. 2193

equivalent to that of state action under the Fourteenth Amendment. Thus, conduct allegedly causing the deprivation of a federal right is only actionable under § 1983 when the conduct is fairly attributable to the state.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: Coverage

[HN2] The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described in all fairness as a state actor. One of the paradigmatic means by which a private party becomes subject to 42 U.S.C.S. § 1983 is through the government's conferral upon that party of what is, at core, sovereign power. The mere fact that a private entity performs a function which serves the public does not make its acts governmental action. Rather, under the "government function" standard, the function performed must be traditionally the exclusive prerogative of the state. The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to carefully confined bounds. The Supreme Court has identified as such functions only the administration of elections, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN3] Only those undertakings that are uniquely sovereign in character qualify as traditional and exclusive state functions.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN4] Under the authority of United States Supreme Court precedent that held that a privately owned company town was a state actor, state action can only be found where a private enterprise assumes all of the attributes of a state-created municipality and performs the full spectrum of municipal powers. It is not enough to establish state action that facilities be devoted to a public function, or that an owner opens up his property for use by the public in general. A private actor must assume plenary control and complete governmental power over the property in question.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN5] The possession of a permit to perform on public property what are ordinarily private functions does not convert the permit holder into a state actor. The actions of a private organization temporarily using public property are not actions that can fairly be attributed to the state. The state action doctrine has never been thought to extend to cases where the street, parks, and public meeting places of a particular community are utilized for the exercise of First Amendment rights.

COUNSEL: ARGUED: Marcia Weil Borowski, STANFORD, FAGAN & GIOLITO, Atlanta, Georgia, for Appellant.

Charles Preyer Roberts, III, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Greensboro, North Carolina, for Appellee.

ON BRIEF: Glenn L. Spencer, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Greensboro, North Carolina; Charlton K. Torrence, III, STOTT, HOLLOWELL, PALMER & WINDHAM, Gastonia, North Carolina, for Appellee.

JUDGES: Before WILKINS, LUTTIG, and WILLIAMS, Circuit Judges. Judge Luttig wrote the opinion, in which Judge Wilkins and Judge Williams joined.

OPINIONBY: LUTTIG

OPINION:

[*904] OPINION

LUTTIG, Circuit Judge:

The United Auto Workers, Local 5285 (UAW), appeals the dismissal of its suit under 42 U.S.C. § 1983 alleging that its First Amendment rights were violated when it was denied an information booth at an annual festival organized by a

private corporation in Gastonia, North Carolina. The district court dismissed the suit after holding that the festival's organizer, Gaston Festivals, Inc. (GFI), [**2] is not a state actor and thus is not subject to the requirements of section 1983. We agree that GFI did not engage in state action and therefore affirm the judgment of the district court.

I.

GFI is a private, non-profit corporation that organizes and promotes the Fish Camp Jam, an annual festival held in downtown Gastonia, North Carolina. The festival's name derives from Gaston County's unique restaurants, called "Fish Camps," which were built along the banks of the county's two rivers to serve the local fishermen's catch. Visitors to the festival are treated to musical acts, games, and contests, and can even go fishing at the festival's fishing hole. Children are entertained by storytellers, jugglers, and clowns. And the festival hosts an art contest and a vintage car display. J.A. at 18-20. There are also two designated food areas, Fish Camp Row and Gaston Flavors, where volunteers fry over four tons of fish and "countless hushpuppies" in eight hours. J.A. at 19. The most popular attraction is the traditional "catfish races," where "farm raised catfish are run in heats," with the winner determined in a final race. For a \$25 donation to local charities, spectators can purchase their[**3] favorite catfish, receive a tee-shirt, and have their photograph taken with the fish. J.A. at 20.

The Fish Camp Jam, in short, is a "one day community celebration" to build civic pride, showcase local talent, food, and culture, and provide entertainment for the local community. J.A. at 18. Its purpose is to provide a day of good, clean fun for the citizens of Gaston County.

The Jam is held on public streets and sidewalks and on private property in Gastonia's downtown area. GFI, as any other entity that wishes to use the City's land, must obtain a permit in order to use the public property during the festival. In addition to approving the permit, the City provides police protection, traffic department assistance, and sanitation services during the nine-hour event. J.A. at 18. In most respects, however, the Fish Camp Jam is conducted independent of the City of Gastonia. The event is staffed by a crew of approximately [*905] 500 volunteers. Although the City historically makes a \$10,000 annual donation to the festival, local businesses provide most of the financing for the event. Local businesses also provide the food and much of the space for the festival. Radio and television stations promote[**4] the event through public service announcements and by sponsoring bands. All of the festival's proceeds go either to local charities or businesses, or to GFI. J.A. at 18-20. And the City plays no active role in planning or managing the festival. GFI alone decides which individuals and organizations will participate in the Fish Camp Jam. J.A. at 159.

During the festival, GFI allows local civic organizations to distribute literature from information booths in an effort to educate festival guests about community service and civic projects. The purpose of having these booths, like the purpose of the festival in general, is to "promote civic pride and awareness . . . not to provide an advocacy forum for all those who wish to put their message before the public." Appellee's Br. at 4. As the event's organizers explained, "political, ideological, and controversial issues are basically inconsistent with the purpose of the Fish Camp Jam." Id.

To ensure that information booths are allotted only to organizations promoting "civic pride and awareness" and that there is at least a limited respite from political and other controversial activities, GFI adopted a booth approval policy which states[**5] that

Fish Camp Jam is neither politically, issue nor religiously oriented. "Issue" is intended to mean a subject which is a topic of public debate or controversy, whether on a local, state or national level (e.g. abortion); and not a subject upon which there appears to be a general consensus of opinion (e.g. anti-litter campaign). The nature of the festival, i.e. a large crowd of people in a relatively small area for several hours, dictates that those "issues" which are likely to foster confrontation or argument not be given a forum either pro or con in this setting. Therefore, booth space will not be granted to organizations falling in these realms.

J.A. at 27. Booth access is also strictly limited to non-profit organizations. J.A. at 27. Pursuant to the booth approval policy, GFI has denied booth space to the Republican, Democratic, and Libertarian parties, and to Planned Parenthood. J.A. at 29. Groups that have been offered booth space include Mothers Against Drunk Driving, the Humane Society, and local bond-issue groups. J.A. at 116.

In September 1993, the UAW applied for booth space to distribute literature on its "Buy American" campaign. The pamphlets that were proposed[**6] for distribution advocated various political positions of interest to the union. One brochure encouraged the boycott of toys made in China because "thousands of children, nuns, priests and other innocent people are jailed or persecuted [there] for their religious and political beliefs." J.A. at 34. Another brochure, opposing the North America Free Trade Agreement, urged "President Clinton and Congress [to] scrap Bush's 'free trade' deal." J.A. at 36. A third brochure, depicting a sweaty and obviously malodorous Nike sneaker, entreated consumers to boycott Nike products because Nike had moved many of its jobs abroad. J.A. at 39. GFI found UAW's messages to be inconsistent with the recreational purposes of the Fish Camp Jam and denied its application for a booth. Both parties acknowledge, however, that even without a booth, UAW members were still free to attend the festival, to hand out pamphlets at festival entrances, and to discuss their views with patrons of the Fish Camp Jam.

UAW instituted this action pursuant to 42 U.S.C. § 1983, alleging that GFI violated UAW's First Amendment rights by denying the union a booth at the festival. UAW sought[**7] injunctive relief, declaratory judgment, damages, and attorneys' fees. In October 1993, the district court held that GFI was not a state actor and therefore could not be sued under section 1983. Accordingly, the court denied UAW's motions for injunctive relief. UAW did not appeal this order, nor did it serve any discovery requests or notice any depositions. After four months passed with UAW taking no action, the district court dismissed UAW's complaint sua [*906] sponte under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. This appeal followed.

II.

[HN1] Section 1983 provides that "every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Liability under section 1983 only extends to persons acting under color of law, a requirement equivalent to that of state action under the Fourteenth Amendment. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982)[**8] (citing *United States v. Price*, 383 U.S. 787, 794 n.7, 16 L. Ed. 2d 267, 86 S. Ct. 1152 (1966)). Thus, "conduct allegedly causing the deprivation of a federal right" is only actionable under section 1983 when the conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Id.* at 936 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)). "This fundamental limitation on the scope of constitutional guarantees preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991)[**9] (quoting *Lugar*, 457 U.S. at 936-37). The issue presented in this case is whether GFI engaged in state action when it organized and managed the 1993 Fish Camp Jam and denied booth space to UAW.

A.

[HN2] The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor. *Id.* at 620. n1 One of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, sovereign power. UAW's primary contention is that Gastonia conferred upon GFI such sovereign power and therefore that under the "government function" strand of the state action doctrine GFI must be held accountable as a state actor.

-----Footnotes-----

n1 Here, the claimed constitutional deprivation is the denial of booth space at the Fish Camp Jam. Because GFI's authority to hold the Fish Camp Jam in downtown Gastonia, and hence its authority to select which organizations may occupy booths, derives from the permit it receives from Gastonia, the threshold requirement of state action that the "constitutional deprivation result[] from the exercise of a right or privilege having its source in state authority," *Edmonson*, 500 U.S. at 620, is obviously satisfied.

-----End Footnotes-----

[**10]

The mere "fact 'that a private entity performs a function which serves the public does not make its acts [governmental] action.'" *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 544, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987) (quoting *Rendell-Baker*, 457 U.S. at 842); see *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984) (that NCAA's regulatory function was of some public service does not support finding of state action, where function is not one traditionally and exclusively reserved to state). Rather, under the "government function" standard, "the function performed [must be] 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974) (emphasis added by *Rendell-Baker Court*)). n2

-----Footnotes-----

n2 The Court in *Edmonson* seemed to ignore the "exclusivity" requirement of the "traditionally exclusive government function" test, *Edmonson*, 500 U.S. at 621, 624-28, and was criticized by the dissent for having "misstated the law," see *id.* at 639 (O'Connor, J., dissenting). The Court's omission of this requirement raises a question as to whether the standard still includes such a requirement. See, e.g., *McKeesport Hospital v. Accreditation Council*, 24 F.3d 519, 528 (3d Cir. 1994) (Becker, J., concurring). However, we do not believe the Supreme Court would have attempted to change radically the government function standard set forth in *Jackson*, 419 U.S. at 353, and thereafter applied consistently in *Flagg Bros.*, 436 U.S. at 157-58, *Rendell-Baker*, 457 U.S. at 842, *Blum v. Yaretsky*, 457 U.S. 991, 1005, 1011-12, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), *USOC*, 483 U.S. at 544-45, and *NCAA v. Tarkanian*, 488 U.S. 179, 197-98 n.18, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988), through the transparent puerilism of simple omission. If it had intended to change the law in this respect, we believe it would have said so explicitly. Moreover, the ultimate reasoning of the Court in *Edmonson* was that juror selection was traditionally an exclusive governmental function. See, e.g., *Edmonson*, 500 U.S. at 627 ("The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government. . . ." (emphasis added)). Accordingly, we proceed on the understanding that the "exclusivity" requirement must be satisfied.

-----End Footnotes-----

[**11]

[*907] The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." *Flagg Bros.*, 436 U.S. at 163. The Supreme Court has identified as functions "traditionally exclusively reserved to the State," *Jackson*, 419 U.S. at 352, only the administration of elections, *Nixon v. Condon*, 286 U.S. 73, 76 L. Ed. 984, 52 S. Ct. 484 (1932); *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953); the operation of a company town, *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); eminent domain, *Jackson*, 419 U.S. at 353 (dicta); peremptory challenges in jury selection, *Edmonson*, 500 U.S. at 624-25; and, in at least limited circumstances, see [**12] discussion *infra* at Part II.B., the operation of a municipal park, *Evans v. Newton*, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). See generally *Jackson*, 419 U.S. at 352 (cataloging cases).

The narrowness of this category is illustrated further by the functions that the Court has held do not fall traditionally within the exclusive prerogative of the state. These include the provision of electricity and other utilities, *id.* at 352-53; the operation of nursing homes, *Blum*, 457 U.S. at 1011-12; and the coordination and governance of college and amateur athletics, *Tarkanian*, 488 U.S. at 197-98 n.18; *USOC*, 483 U.S. at 544-45. The Court has held that schooling for maladjusted children does not qualify as a traditional and exclusive state function. *Rendell-Baker*, 457 U.S. at 842[**13] ("Until recently the State had not undertaken to provide education for students who could not be served by traditional public schools."). It has also noted that the provision of education does not render a private school's administrators state actors, even though "it is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools." *Jackson*, 419 U.S. at 354 n.9 (quoting *Newton*, 302 U.S. at

300) (observing that private parochial educational systems may operate without being subject to state action doctrine). See also *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir.), cert. denied, 493 U.S. 850, 107 L. Ed. 2d 106, 110 S. Ct. 148 (1989) ("care of foster children" not considered traditionally and exclusively a governmental function).

Together, these cases confirm that [HN3] only those undertakings that are uniquely sovereign in character qualify as traditional and exclusive state functions. As the Court[**14] has observed, "while many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros.*, 436 U.S. at 158; see also *Jackson*, 419 U.S. at 353 (referring to the "limited line of cases" finding a function to be exclusively and traditionally governmental).

B.

The organization, management, and promotion of events such as the Fish Camp Jam do not fall within the domain of functions [*908] exercised traditionally and exclusively by the government. The government has not traditionally been the sole provider of community entertainment. Nor has it traditionally been the exclusive organizer of festivals, parades, or fairs. Fairs and festivals such as the Fish Camp Jam have traditionally been administered primarily by private organizations, like churches, civic groups, or local business consortiums. The Supreme Court has expressed doubts that, as a general matter, "the operation of a park for recreational purposes is an exclusively public function," particularly in light of "the experience of several American entrepreneurs[**15] who amassed great fortunes by operating parks for recreational purposes." *Flagg Bros.*, 436 U.S. at 159 n.8; see also *Tarkanian*, 488 U.S. at 197-98 n.18 (the coordination of amateur sports is "by no means . . . a traditional, let alone an exclusive, state function"); *USOC*, 483 U.S. at 544-45 (same). Given the Court's reluctance to recognize the full-time management and operation of a park as a traditionally exclusive government function, we cannot conclude that GFI's organization of an annual, day-long Fish Camp Jam qualifies as state action. At bottom, in organizing the Fish Camp Jam, GFI merely "coordinates activities that always have been performed by private entities." *USOC*, 483 U.S. at 544-45. n3

-----Footnotes-----

n3 We decline UAW's invitation to remand this case for additional factfinding on whether conduct of an annual festival like the Fish Camp Jam is traditionally and exclusively a government function. Unlike in *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 218 (4th Cir. 1993), where the district court had essentially taken judicial notice that fire protection was not traditionally an exclusive state function, notwithstanding the Supreme Court's explicit reservation of the question, see *Flagg Bros.*, 436 U.S. at 163-64, we do not believe development of a more complete factual record could lead to a different conclusion than that we reach herein.

-----End Footnotes-----

[**16]

UAW relies principally on *Evans v. Newton*, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966), to assert that the provision of "amusement" or "recreation" is an exclusive government function. Appellant's Br. at 15-16. In holding that the private trustees' operation of the public park in Newton constituted state action, the Court did say that "[a] park" is an entity that "traditionally serves the community" and that "mass recreation through the use of parks is plainly in the public domain." *Newton*, 382 U.S. at 302. As noted, however, the Court in *Flagg Bros.* expressed "doubt that Newton intended to establish the broad doctrine" that "operation of a park for recreational purposes is an exclusively public function." *Flagg Bros.*, 436 U.S. at 159 n.8. Rather, the Court explained, Newton represented "a finding of ordinary state action under extraordinary circumstances," *id.*, because in that case transfer of the municipal park from public to private hands "had not been shown to have eliminated[**17] the actual involvement of the city in the daily maintenance and care of the park," *id.*

Newton, in other words, is best understood as a case in which the challenged decisions were imputable to the city because the city remained "entwined in the management or control of the park." *Newton*, 382 U.S. at 301. Even

assuming that the one-day Fish Camp Jam festival could be compared analytically to the ongoing management and operation of a public park, there is no state participation in the Fish Camp Jam comparable to that in Newton. UAW does not allege that Gastonia played any role in the festival's management. Nor does it allege that the City played any role in deciding which organizations could occupy festival booths.

C.

In apparent recognition that the organization of festivals and fairs is not traditionally an exclusive government function, UAW alternatively attempts to redefine the power exercised by GFI in a way that would justify constitutional scrutiny. UAW contends that Gastonia has "ceded control of its town center to [GFI]," Appellant's Br. at 15, and that the City has "turned over the running of its downtown[**18] area to a private corporation," *id.* at 19, to such an extent that the downtown [*909] area is essentially GFI's private property. By characterizing GFI's authority in this way, UAW attempts to come within the ambit of *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946), which held that a corporation that operated a privately owned company town was a state actor. This effort is strained at best, even conceding for present purposes that the underlying rationale of *Marsh* could be extended to the context where the property in question is in fact publicly owned.

The Supreme Court has held that [HN4] state action can only be found under the authority of *Marsh* where "a private enterprise [assumes] all of the attributes of a state-created municipality" and performs "the full spectrum of municipal powers." *Hudgens v. NLRB*, 424 U.S. 507, 519, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976) (emphasis added). It is not enough to establish state action, contrary to UAW's argument, that facilities be devoted to a "public function," Appellant's Br. at 14[**19] (quoting *Marsh*, 326 U.S. at 506), or that an owner "opens up his property for use by the public in general," *id.* at 15 (quoting *Marsh*, 326 U.S. at 506). A private actor must assume plenary control and complete governmental power over the property in question.

It is plain from the record before us that, while GFI plays a significant role in organizing and directing the entertainment activities in the downtown area during the day-long Fish Camp Jam, GFI has not been afforded and has not otherwise assumed the requisite amount of governmental control over even a single "municipal power," much less sufficient power to qualify as a state actor under *Marsh* and *Hudgens*.

To begin with, the very existence of a permit system for approval of private functions on public property demonstrates that the City of Gastonia, and not GFI, exercises ultimate control over the use of the public property and facilities. The City also provides essential services to support the festival, further confirming that GFI has not assumed plenary control over Gastonia. The Gastonia[**20] police department "provides manpower to close down the streets, protection of the site during set up, tear down, and during the festival itself." J.A. at 18. "The City traffic department provides barricades to close the streets, hangs banners and drops electrical cords from supplies on poles." J.A. at 18. The fire department provides water for the event and presumably stands ready to assist should a fire break out. J.A. at 18. There is no evidence in the record that Gastonia has relinquished control over any of these basic functions to GFI during the Fish Camp Jam. n4

-----Footnotes-----

n4 While reliance on state resources may provide a basis for establishing state action under the so-called "nexus test," the presence of state assistance undermines UAW's claim that GFI has assumed plenary control over downtown Gastonia. Even UAW concedes that, as the case is presently postured, there is an insufficient nexus between GFI and Gastonia to establish state action on that ground, particularly in light of the Supreme Court's treatment of the nexus test in *Jackson*, *Rendell-Baker*, *Blum*, and *USOC*.

-----End Footnotes-----

[**21]

The permits are also replete with conditions that underscore Gastonia's retention of governmental authority. Approval of GFI's noise permit was conditioned on GFI's "compliance with all regulations and ordinances of the City of Gastonia." J.A. at 89. GFI agreed to give "full cooperation to the Gastonia Police Department in enforcing the noise ordinance . . . and to be capable of assisting the Gastonia police officers in their enforcement duties." J.A. at 89. The noise permit also notified GFI that "failure to [comply] may result in revocation of this permit and the imposition of a civil penalty." J.A. at 89. Under the terms of the parade permit, the City of Gastonia "reserved the right to re-open the streets at any time," again leaving no doubt that Gastonia retained control of and responsibility for the entire festival area. J.A. at 86.

At the same time that the City of Gastonia has retained the essence of its sovereign power, GFI, in exercising the limited authority that has been conferred upon it, has not sought to assert the full extent of its power. UAW has virtually complete freedom to spread its message in Gastonia; its only restriction is that, on the single day of the year[**22] on which GFI holds the Fish Camp Jam, the [*910] Local may not obtain a booth to distribute literature in the particular downtown area of Gastonia permitted for use by the festival. Union members may freely distribute their literature and advocate political positions with the patrons of the Fish Camp Jam, or they can seek a permit from Gastonia to hold their own festival celebrating organized labor. UAW is presented with "a far wider number of choices" for disseminating its message in Gastonia than was the "member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time Marsh was decided," a factor the Court has found significant when considering the presence of state action on the authority of Marsh. Flagg Bros., 436 U.S. at 162.

III.

That GFI obtains a permit from the City of Gastonia in order to conduct its festival in part on public property does not in any way alter our conclusion that GFI acts solely in a private capacity when it holds the Fish Camp Jam festival. [HN5] The possession of a permit to perform on public property what are ordinarily private functions does not convert the permit[**23] holder into a state actor. See Jackson, 419 U.S. at 357 ("Approval by a state utility commission[of a proposed practice by a privately-owned utility], where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'"); USOC, 483 U.S. at 543 ("The fact that Congress granted [USOC] a corporate charter does not render the USOC a Government agent."). We have long adhered to the principle that the actions of a private organization temporarily using public property are not actions that can fairly be attributed to the state. As we observed en banc two decades ago, "the state action doctrine has never been thought to extend to cases where the street, parks and public meeting places of a particular community are utilized for the exercise of first amendment rights." National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973). The principle established in Ringers[**24] ensures that private organizations like GFI that wish to use public property to organize festivals, fairs, rallies, parades, or meetings, are not chilled from doing so by the possibility that they will be subject to liability as if they were agents of the government. See also NBC v. Communications Workers of Am., AFLCIO, 860 F.2d 1022, 1025 (11th Cir. 1988) (rejecting the proposition that a private party's "actions constituted state action merely because [it] held its convention in a public building"). Just as in Ringers, "the essential point here is not that there is insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum dedicated to that purpose." Ringers, 473 F.2d at 1017.

UAW argues that in permitting GFI exclusive use of the city's public streets and sidewalks, Gastonia has effectively ceded to GFI the power to regulate speech on the streets and sidewalks of the city. This, UAW urges, is manifestly a public function. See Appellant's Reply Br. at 4-5 (citing Cox v. New Hampshire, 312 U.S. 569, 574, 85 L. Ed. 1049, 61 S. Ct. 762 (1941)).[**25] When it permits GFI to use the streets and sidewalks for the Fish Camp Jam, however, Gastonia does not cede to GFI the sovereign power to regulate speech on those streets and sidewalks. That the City must issue the permit and that it retains the authority to revoke it, prove that the City has not ceded its ultimate regulatory powers. The City's award of the permit merely allows GFI to use the streets and sidewalks for the time and purpose of the permit.

In the course of using the streets and sidewalks during the festival, GFI does exercise a power to decide who may operate booths at the Fish Camp Jam, and exercise of this power does have the incidental effect of restricting at least the manner in which UAW members are able to speak in the area of the festival during the day in question. That these purely private decisions have the incidental effect of restricting others in their use of the property, however, does not

transform that which is not a traditional and exclusive state function into one that is. If a [*911] party obtaining a permit to use public property for a specific event were constitutionally required to admit unconditionally everyone seeking admission, it would be virtually[**26] impossible to hold the event for which the permit was obtained.

Indeed, the Supreme Court rejected an argument indistinguishable in principle from UAW's in USOC. There, Congress granted the United States Olympic Committee "the right to prohibit certain commercial and promotional uses of the word 'Olympic' and various Olympic symbols." USOC, 483 U.S. at 526. The USOC then used that right to terminate an unaffiliated organization's use of the word "Olympic." Id. at 527. The Court refused to accord the USOC state actor status on the basis of its action, because "the USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision." Id. at 547; see also *Blum*, 457 U.S. at 989-90 (even if it could be shown that the state was responsible for providing its elderly citizens with nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the[**27] kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public"). GFI's decision not to offer booth space to UAW is no more state action than was USOC's decision to enforce its exclusive use right against the unaffiliated organization.

IV.

The consequences of finding state action in this case would be difficult to overstate. Were we to hold that the incidental power to exclude others from public property during the course of a limited, permitted use transformed the permit holder into a state actor, softball teams on the Mall in Washington, D.C. would be constitutionally obliged to afford due process to those not allowed to play on the particular field at the same time. Every family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds. The local church could no longer use public facilities to hold events for fear of violating the Establishment Clause. Every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny merely because the organizer had "been granted exclusive use of city facilities . . . as [**28] well as authority to determine who may use those . . . facilities and what they may say while on the public fora." Appellant's Br. at 23.

Ironically, under its proposed rule, even UAW would no longer be able to exclude its own opponents from pro-labor rallies and meetings held on public property. Anti-labor activists would have to be permitted to participate in Labor Day parades, and management would be constitutionally protected against exclusion from union meetings held in publicly owned meeting halls. Realizing the untenability of UAW's proposed rule, the Eleventh Circuit afforded a labor union the very protection that UAW seeks to deny GFI in this case. See *NBC v. Communications Workers of Am., AFL-CIO*, 860 F.2d 1022, 1025-26 (11th Cir. 1988) (holding that the AFL-CIO, as a private actor, can constitutionally exclude a media organization with which it had a political difference from the union's annual convention held in a public facility in Miami). The decisions of the Supreme Court and of this circuit are clear that GFI must be afforded the same protection to which the union is entitled.

Because GFI was not subject to liability as a state actor[**29] under section 1983 when it held the annual Fish Camp Jam, the proper course was to dismiss UAW's complaint, as the district court did. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

UNITED STATES v. PRICE ET AL.
Nos. 59, 60

SUPREME COURT OF THE UNITED STATES

383 U.S. 787; 86 S. Ct. 1152; 16 L. Ed. 2d 267; 1966 U.S.LEXIS 1963

November 9, 1965, Argued
March 28, 1966, Decided

PRIOR HISTORY:

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, the United States, sought review of the dismissal in part of two indictments against respondents for violations of due process of law under 18 U.S.C.S. §§ 241 and 242.

OVERVIEW: Petitioner, the United States, charged respondents, law enforcement officials and their associates, with civil rights violations. The federal charges stemmed from the murder of three civil rights activists by respondents. The indictment against respondents charged that they acted in concert to pull the victims over, arrest them, and later murder them. The indictment for federal crimes charged that respondents, acting under color of state law, conspired to deprive victims of their right to due process of law. The appellate court dismissed part of the indictment charging private citizens on the basis they could not act under color of state law. On review, the court reversed and held that private persons jointly engaged with officials in the prohibited action were acting under color of law. Respondents were also charged under a broad federal statute prohibiting a conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise of any right guaranteed to them under the U.S. Constitution. The court held that the statute was not overbroad in its application to respondents, and reversed and remanded on those charges as well.

OUTCOME: Petitioner was granted relief on review and the court reversed the decision of the appellate court to partially dismiss indictments against respondents for violations of due process of law and conspiracy.

CORE TERMS: indictment, Fourteenth Amendment, conspiracy, color, state action, appropriate legislation, deprivation, assault, process of law, color of law, civil rights, reconstruction, misdemeanor, enjoyment, omission, punish, intimidate, free exercise, indicted, felony, voting, deputy sheriff, outrages, direct appeal, conspire, offender, deprive, jail, Enforcement Act, right of suffrage

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Criminal Offenses: Crimes Against the Person: Civil Rights Violations

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN1] 18 U.S.C.S. § 242 provides punishment for whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Criminal Law & Procedure: Criminal Offenses: Crimes Against the Person: Civil Rights Violations

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

[HN2] If the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. 18 U.S.C.S. § 371.

Criminal Law & Procedure: Criminal Offenses: Crimes Against the Person: Civil Rights Violations

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN3] 18 U.S.C.S. § 242 applies only where a person indicted has acted "under color" of law. Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agent.

Constitutional Law: Procedural Due Process

Criminal Law & Procedure: Criminal Offenses: Inchoate Crimes: Conspiracy

[HN4] See 18 U.S.C.S. § 241.

Constitutional Law: Substantive Due Process

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1871: State Action

[HN5] U.S. Const. amend. XIV protects the individual against state action, not against wrongs done by individuals.

Constitutional Law: Substantive Due Process

[HN6] 18 U.S.C.S. § 241, from original enactment through subsequent codifications, was intended to deal with conspiracies to interfere with all federal rights.

SUMMARY: Two indictments were returned in the United States District Court for the Southern District of Mississippi against the defendants, police officers and private individuals; the one in No. 59 charged them with violating 18 USC 241--making a conspiracy to interfere with a citizen's exercise and enjoyment of rights secured by the Federal Constitution a criminal offense--by conspiring to release their victims from jail and then to intercept them and kill them, and the other in No. 60 charged defendants with violating 18 USC 242--making it a criminal offense wilfully to deprive a person under color of law of such rights--by performing the acts contemplated in the conspiracy. The District Court held the indictment in No. 60 valid as to the police officers, but dismissed it as to the nonofficial defendants. The indictment in No. 59 was dismissed by the District Court as to all defendants on the ground that 241 did not include rights protected by the Fourteenth Amendment.

On appeal, the Supreme Court of the United States reversed. In an opinion by Fortas, J., it was unanimously held (1) in No. 60 that private individuals were criminally liable under 242, if they were wilful participants in joint activity with the state or its agents, and (2) in No. 59 that 241 reached assaults upon rights under the entire Constitution, including rights under the due process clause.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

due process -- enforcement --

Headnote:

Congress has the power to enforce by appropriate criminal sanction every right guaranteed by the due process clause of the Fourteenth Amendment.

[***HN2]

criminal liability of police officers --

Headnote:

Police officers who intercepted their erstwhile wards in jail on a highway for the purpose and with the intent to "punish" them, and transported them in the official automobile of the sheriff's office to a place where they killed them, act "under color of law" as required by, and are guilty of violating, 18 USC 242, which makes it a federal offense wilfully to

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

deprive any person under color of law of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

[***HN3]

criminal liability of private persons --

Headnote:

Private persons who participate in the interception by police officers of the latters' erstwhile wards in jail and in killing them are guilty of a violation of 18 USC 242, making it a federal offense wilfully to deprive any person under color of law of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

[***HN4]

criminal liability of private persons --

Headnote:

For the purposes of 18 USC 242, making it a federal offense wilfully to deprive any person under color of law of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law; to act "under color" of law does not require that the accused be an officer of the state, it being sufficient that he is a wilful participant in joint activity with the state or its agents.

[***HN5]

construction -- similar language -- civil and criminal sanctions --

Headnote:

The phrase "under color of any statute, ordinance, regulation, or custom" should be accorded the same construction in both 18 USC 242, which provides for criminal punishment of, and 42 USC 1983, which gives a right of action against, a person who, "under color of" state law subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution.

[***HN6]

by government in criminal case -- dismissal of indictment --

Headnote:

The Supreme Court of the United States has jurisdiction of a direct appeal from a District Court's dismissal of an indictment charging private individuals with violating 18 USC 242, which makes it a federal offense wilfully to deprive any person under color of law of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, where the dismissal is based on the District Court's view that the statute requires that each offender be an official or that he act in an official capacity.

[***HN7]

criminal liability -- protected rights --

Headnote:

Both 18 USC 241, which makes a conspiracy to interfere with a citizen's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States a federal offense, and 18 USC 242, which

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***, 1966 U.S. LEXIS 1963

makes it a federal offense wilfully to deprive any person under color of law of the same rights, include, presumably, all of the Constitution and laws of the United States.

[***HN8]

interference with civil rights --

Headnote:

The federal civil rights statute (18 USC 241), which makes a conspiracy to interfere with a citizen's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States a criminal offense, includes rights or privileges protected by the Fourteenth Amendment, and extends to conspiracies otherwise within the scope of the statute, participated in by officials alone or in collaboration with private persons.

[***HN9]

criminal liability -- interference with civil rights --

Headnote:

The federal civil rights statute (18 USC 241), which makes a conspiracy to interfere with the citizen's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States a criminal offense, is violated by a conspiracy between police officers and private persons the purpose of which was that one of the officers would release prisoners from custody in jail and that all the defendants would intercept them and threaten to kill them.

[***HN10]

punishment without trial --

Headnote:

The Fourteenth Amendment denounces punishment without trial.

[***HN11]

Fourteenth Amendment -- scope. --

Headnote:

The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals.

[***HN12]

civil rights statute -- scope --

Headnote:

The federal civil rights statute (18 USC 241), which makes a conspiracy to interfere with a citizen's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States a criminal offense, embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States, including the Thirteenth, Fourteenth, and Fifteenth Amendments; the sweep of the statute is not confined to rights that are conferred by or flow from the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution.

[***HN13]

civil rights statute -- construction --

Headnote:

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

The federal civil rights statute (18 USC 241), which makes a conspiracy to interfere with a citizen's right or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States a criminal offense, must be accorded a sweep as broad as its language; this language includes rights under the due process clause of the Fourteenth Amendment.

[***HN14]

relation to federal government -- due process --

Headnote:

The mandate of the Fourteenth Amendment that no state shall deprive any person of life or liberty without due process of law is a direct, traditional concern of the Federal Government; a decision interpreting a federal law in accordance with its historical design, that is, to punish denials by state action of the constitutional rights of a person, cannot be regarded as adversely affecting the wise adjustment between state responsibility and national control.

SYLLABUS: Appellees are three Mississippi law enforcement officials and 15 private individuals who are alleged to have conspired to deprive three individuals of their rights under the Fourteenth Amendment. The alleged conspiracy involved releasing the victims from jail at night; intercepting, assaulting and killing them; and disposing of their bodies. Its purpose was to "punish" the victims summarily. Two indictments were returned. One charged all appellees with a conspiracy under 18 U. S. C. § 371 to violate 18 U. S. C. § 242, which makes it a misdemeanor willfully and under color of law to subject any person to the deprivation of any rights secured or protected by the Constitution. The indictment also charged all appellees with substantive violations of § 242. The District Court sustained the conspiracy count against a motion to dismiss, and sustained the substantive counts as to the three official defendants. It dismissed the substantive counts as to the 15 private defendants on the ground that although the indictment alleged that they had acted "under color" of law, it did not allege that they were acting as officers of the State. This dismissal is here on direct appeal as No. 60. The other indictment charged all appellees with a conspiracy in violation of 18 U. S. C. § 241, making it a felony to conspire to interfere with a citizen in the free exercise or enjoyment of any right secured or protected by the Constitution or laws of the United States. The District Court dismissed this indictment as to all appellees on the ground that § 241 does not include rights protected by the Fourteenth Amendment. This dismissal is here on direct appeal as No. 59. Held:

1. The District Court erred in dismissing the indictment in No. 60 insofar as it charged the private defendants with substantive violations of § 242. Pp. 794-796.

(a) "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Pp. 794-795.

(b) The dismissal of the indictment in No. 60 as to the private persons resulted from the District Court's erroneous construction of the "under color" of law requirement of § 242 as making the statute inapplicable to nonofficials, not upon a construction of the indictment as a pleading; hence the dismissal is reviewable on direct appeal. Pp. 795-796.

2. Section 241 includes within its protection rights secured or protected by the Fourteenth Amendment, and the District Court accordingly erred in dismissing the indictment in No. 59. Pp. 796-807.

(a) The District Court incorrectly assumed that *United States v. Williams*, 341 U.S. 70, authoritatively determined the inapplicability of § 241 to deprivations of Fourteenth Amendment rights. The Justices who reached that issue in *Williams* divided equally on the question. That case "thus left the proper construction of § 241, as regards its applicability to protect Fourteenth Amendment rights, an open question." Pp. 797-798.

(b) "There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60 . . . it alleges that the defendants acted 'under color of law' and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States." Pp. 799-800.

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

(c) The wording of § 241 suggests no limitation of its coverage to exclude Fourteenth Amendment rights. "The language of § 241 is plain and unlimited. . . . Its language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States." P. 800.

(d) The legislative history of § 241 supports the view that it was intended to encompass Fourteenth Amendment rights within its protection. Pp. 800-806.

COUNSEL: Solicitor General Marshall argued the cause for the United States. With him on the brief were Assistant Attorney General Doar, Louis F. Claiborne and Gerald P. Choppin.

H. C. Mike Watkins argued the cause for appellees. With him on the brief were Dennis Goldman, Laurel G. Weir and Herman Alford.

JUDGES: Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, White, Douglas

OPINIONBY: FORTAS

OPINION: [*789] [***269] [**1154] MR. JUSTICE FORTAS delivered the opinion of the Court.

These are direct appeals from the dismissal in part of two indictments returned by the United States Grand Jury for the Southern District of Mississippi. The indictments allege assaults by the accused persons upon the rights of the asserted victims to due process of law under the Fourteenth Amendment. The indictment in No. 59 charges 18 persons n1 with violations of 18 U. S. C. § 241 [***270] (1964 ed.). In No. 60, the same 18 persons are charged with offenses based upon 18 U. S. C. § 242 (1964 ed.). These are among the so-called civil rights statutes which have come to us from Reconstruction days, the period in our history which also produced the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

-----Footnotes-----

n1 One of the defendants charged in the two indictments, James E. Jordan, is not a party to the present appeal. His case was transferred under Rule 20, Fed. Rules Crim. Proc., to the United States District Court for the Middle District of Georgia.

-----End Footnotes-----

[***HR1] The sole question presented in these appeals is whether the specified statutes make criminal the conduct for which the individuals were indicted. It is an issue of construction, not of constitutional power. We have no doubt of "the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment." United States v. Williams, 341 U.S. 70, 72. n2

-----Footnotes-----

n2 Cf. Mr. Justice Holmes in United States v. Mosley, 238 U.S. 383, 386 (a federal voting rights case under an earlier version of § 241): "It is not open to question that this statute is constitutional" The source of congressional power in this case is, of course, § 5 of the Fourteenth Amendment, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There are three "Williams" cases arising from the same events. The first, with no bearing on the present appeal is United States v. Williams, 341 U.S. 58, involving a prosecution for perjury. The second, United States v. Williams, 341 U.S. 70, was a prosecution for violation of § 241; it will be referred to hereinafter as Williams I. The third, Williams v. United States, 341 U.S. 97, was a prosecution for violation of § 242; it will be referred to as Williams II.

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

-----End Footnotes-----

[*790] The [**1155] events upon which the charges are based, as alleged in the indictments, are as follows: On June 21, 1964, Cecil Ray Price, the Deputy Sheriff of Neshoba County, Mississippi, detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County jail located in Philadelphia, Mississippi. He released them in the dark of that night. He then proceeded by automobile on Highway 19 to intercept his erstwhile wards. He removed the three men from their automobile, placed them in an official automobile of the Neshoba County Sheriff's office, and transported them to a place on an unpaved road.

These acts, it is alleged, were part of a plan and conspiracy whereby the three men were intercepted by the 18 defendants, including Deputy Sheriff Price, Sheriff Rainey and Patrolman Willis of the Philadelphia, Mississippi, Police Department. The purpose and intent of the release from custody and the interception, according to the charge, were to "punish" the three men. The defendants, it is alleged, "did wilfully assault, shoot and kill" each of the three. And, the charge continues, the bodies of the three victims were transported by one of the defendants from the rendezvous on the unpaved road to the vicinity of the construction site of an earthen dam approximately five miles southwest of Philadelphia, Mississippi.

[*791] These are federal and not state indictments. They do not charge as crimes the alleged assaults or murders. The indictments are framed to fit the stated federal statutes, and the question before us is whether the attempt of the draftsman for the Grand Jury in Mississippi has been successful: whether the indictments charge offenses against the various defendants which may be prosecuted under the designated federal statutes.

We shall deal first with the indictment [***271] in No. 60, based on § 242 of the Criminal Code, and then with the indictment in No. 59, under § 241. We do this for ease of exposition and because § 242 was enacted by the Congress about four years prior to § 241. n3 Section 242 was enacted in 1866; § 241 in 1870.

-----Footnotes-----

n3 In the interest of clarity, we shall use the present designation of the statutes throughout this discussion. Reference is made to the Appendix to Mr. Justice Frankfurter's opinion in *Williams I*, 341 U.S., at 83, which contains a table showing major changes in the statutes through the years.

-----End Footnotes-----

I. No. 60.

Section 242 defines a misdemeanor, punishable by fine of not more than \$1,000 or imprisonment for not more than one year, or both. So far as here significant, [HN1] it provides punishment for "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"

The indictment in No. 60 contains four counts, each of which names as defendants the three officials and 15 nonofficial persons. The First Count charges, on the basis of allegations substantially as set forth above, that all of the defendants conspired "to wilfully subject" Schwerner, Chaney and Goodman "to the deprivation [*792] of their right, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi." This is said to constitute a conspiracy to violate § 242, and therefore an offense under 18 [**1156] U. S. C. § 371 (1964 ed.). The latter section, the general conspiracy statute, makes it a crime to conspire to commit any offense against the United States. The penalty for violation is the same as for direct violation of § 242 -- that is, it is a misdemeanor. n4

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

-----Footnotes----- [HN2] -

n4 "If . . . the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U. S. C. § 371 (1964 ed.).

-----End Footnotes-----

[***HR2A] On a motion to dismiss, the District Court sustained this First Count as to all defendants. As to the sheriff, deputy sheriff and patrolman, the court recognized that each was clearly alleged to have been acting "under color of law" as required by § 242. n5 As to the private persons, the District Court held that "It is immaterial to the conspiracy that these private individuals were not acting under color of law" because the count charges that they were conspiring with persons who were so acting. See *United States v. Rabinowich*, 238 U.S. 78, 87.

[***HR2B]

-----Footnotes----- n5 This is settled by our decisions in *Screws v. United States*, 325 U.S. 91, 107-113, and *Williams II*, 341 U.S., at 99-100.

-----End Footnotes-----

The court necessarily was satisfied that the indictment, in alleging the arrest, detention, release, interception and killing of Schwerner, Chaney and Goodman, adequately stated as the purpose of the conspiracy, a violation of § 242, and that this section could be violated by "wilfully subject[ing the victims] . . . to the deprivation of their right, privilege and immunity" under the Due Process Clause of the Fourteenth Amendment.

[*793] No appeal was taken by the defendants from the decision of the trial court with respect to the First [***272] Count and it is not before us for adjudication.

The Second, Third and Fourth Counts of the indictment in No. 60 charge all of the defendants, not with conspiracy, but with substantive violations of § 242. Each of these counts charges that the defendants, acting "under color of the laws of the State of Mississippi," "did wilfully assault, shoot and kill" Schwerner, Chaney and Goodman, respectively, "for the purpose and with the intent" of punishing each of the three and that the defendants "did thereby wilfully deprive" each "of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States" -- namely, due process of law.

The District Court held these counts of the indictment valid as to the sheriff, deputy sheriff and patrolman. But it dismissed them as against the nonofficial defendants because the counts do not charge that the latter were "officers in fact, or de facto in anything allegedly done by them 'under color of law.'"

We note that by sustaining these counts against the three officers, the court again necessarily concluded that an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life and liberty without due process of law. We agree. No other result would be permissible under the decisions of this Court. *Screws v. United States*, 325 U.S. 91; *Williams II*. n6

-----Footnotes-----

n6 ". . . where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court." *Williams II*, 341 U.S., at 101.

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***, 1966 U.S. LEXIS 1963

-----End Footnotes-----

[*794]

***HR3] ***HR4] ***HR5] But we cannot agree that the Second, Third or Fourth Counts may be dismissed as against the nonofficial defendants. [HN3] Section 242 applies only where a person indicted has acted "under color" of law. Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. n7

-----Footnotes----- n7 "Under color" of law means the same thing in § 242 that it does in the civil counterpart of § 242, 42 U. S. C. § 1983 (1964 ed.). *Monroe v. Pape*, 365 U.S. 167, 185 (majority opinion), 212 (Frankfurter, J., dissenting). In cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment. See, e. g., *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C. A. 4th Cir.), cert. denied, 376 U.S. 938; *Smith v. Holiday Inns*, 336 F.2d 630 (C. A. 6th Cir.); *Hampton v. City of Jacksonville*, 304 F.2d 320 (C. A. 5th Cir.), cert. denied, 371 U.S. 911; *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (C. A. 5th Cir.); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (C. A. 4th Cir.), cert. denied, 326 U.S. 721.

The contrary view in a § 242 context was expressed by the dissenters in *Screws*, 325 U.S., at 147-149, and was rejected then, later in *Williams II*, and finally -- in a § 1983 case -- in *Monroe v. Pape*, supra. Cf. *Peterson v. City of Greenville*, 373 U.S. 244, 250 (separate opinion of HARLAN, J.). Recent decisions of this Court which have given form to the "state action" doctrine make it clear that the indictments in this case allege conduct on the part of the "private" defendants which constitutes "state action," and hence action "under color" of law within § 242. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, we held that there is "state action" whenever the "State has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S., at 725. Cf. *Pennsylvania v. Board of Trustees*, 353 U.S. 230; *Evans v. Newton*, 382 U.S. 296; *Peterson v. City of Greenville*, 373 U.S. 244; *Lombard v. Louisiana*, 373 U.S. 267; *Robinson v. Florida*, 378 U.S. 153; *Griffin v. Maryland*, 378 U.S. 130; *American Communications Assn. v. Douds*, 339 U.S. 382, 401; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461; *Williams II*, 341 U.S., at 99-100.

-----End Footnotes-----

[*795] In the present case, according to the indictment, the brutal joint adventure [***273] was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.

***HR6] Appellees urge that the decision of the District Court was based upon a construction of the indictment to the effect that it did not charge the private individuals with acting "under color" of law. Consequently, they urge us to affirm in No. 60. In any event, they submit, [**1158] since the trial court's decision was based on the inadequacy of the indictment and not on construction of the statute, we have no jurisdiction to review it on direct appeal. *United States v. Swift & Co.*, 318 U.S. 442. We do not agree. Each count of the indictment specifically alleges that all of the defendants were acting "under color of the laws of the State of Mississippi." The fault lies not in the indictment, but in the District Court's view that the statute requires that each offender be an official or that [*796] he act in an official capacity. We have jurisdiction to consider this statutory question on direct appeal and, as we have shown, the trial court's

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

determination of it is in error. Since each of the private individuals is indictable as a principal acting under color of law, we need not consider whether he might be held to answer as an "aider or abettor" under 18 U. S. C. § 2 (1964 ed.), despite omission to include such a charge in the indictment.

Accordingly, we reverse the dismissal of the Second, Third and Fourth Counts of the indictment in No. 60 and remand for trial.

II. No. 59.

No. 59 charges each of the 18 defendants with a felony -- a violation of § 241. This indictment is in one count. It charges that the defendants "conspired together . . . to injure, oppress, threaten and intimidate" [***274] Schwerner, Chaney and Goodman "in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi." The indictment alleges that it was the purpose of the conspiracy that Deputy Sheriff Price would release Schwerner, Chaney and Goodman from custody in the Neshoba County jail at such time that Price and the other 17 defendants "could and would intercept" them "and threaten, assault, shoot and kill them." The penalty under § 241 is a fine of not more than \$5,000, or imprisonment for not more than 10 years, or both.

[HN4] Section 241 is a conspiracy statute. It reads as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the [*797] United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured --

"They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both."

The District Court dismissed the indictment as to all defendants. In effect, although § 241 includes rights or privileges secured by the Constitution or laws of the United States without qualification or limitation, the court held that it does not include rights protected by the Fourteenth Amendment.

[***HR7] It will be recalled that in No. 60 the District Court held that § 242 included the denial of Fourteenth Amendment rights -- the same right to due process involved in the indictment under § 241. Both include rights or privileges secured by the Constitution or laws of the United States. Neither is qualified or limited. Each includes, presumably, all of the Constitution and laws of the United States. To the reader of the two sections, versed only in the English language, it may seem bewildering that the two sections could be so differently read.

But the District Court purported to read the statutes with the gloss of *Williams I.* In that case, the only case in which this Court has squarely confronted [**1159] the point at issue, the Court did in fact sustain dismissal of an indictment under § 241. But it did not, as the District Court incorrectly assumed, hold that § 241 is inapplicable to Fourteenth Amendment rights. The Court divided equally on the issue. Four Justices, in an opinion by Mr. Justice Frankfurter, were of the view that § 241 "only covers conduct which interferes with rights arising from the substantive powers of the Federal Government" -- rights "which Congress can beyond doubt [*798] constitutionally secure against interference by private individuals." 341 U.S., at 73, 77. Four other Justices, in an opinion by MR. JUSTICE DOUGLAS, found no support for Mr. Justice Frankfurter's view in the language of the section, its legislative history, or its judicial interpretation up to that time. They read the statute as plainly covering conspiracies to injure others in the exercise of Fourteenth [***275] Amendment rights. They could see no obstacle to using it to punish deprivations of such rights. Dismissal of the indictment was affirmed because MR. JUSTICE BLACK voted with those who joined Mr. Justice Frankfurter. He did so, however, for an entirely different reason -- that the prosecution was barred by *res judicata* -- and he expressed no view on the issue whether "§ 241, as applied, is too vague and uncertain in scope to be consistent with

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

the Fifth Amendment." Williams I thus left the proper construction of § 241, as regards its applicability to protect Fourteenth Amendment rights, an open question.

[***HR8] [***HR9] In view of the detailed opinions in Williams I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that § 241 must be read as it is written -- to reach conspiracies "to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."; that this language includes rights or privileges protected by the Fourteenth Amendment; that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons; and that the indictment in No. 59 properly charges such a conspiracy in violation of § 241. We shall confine ourselves to a review of the major considerations which induce our conclusion.

[*799] 1. There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60, *supra*, it alleges that the defendants acted "under color of law" and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States.

The indictment specifically alleges that the sheriff, deputy sheriff and a patrolman participated in the conspiracy; that it was a part of the "plan and purpose of the conspiracy" that Deputy Sheriff Price, "while having [the three victims] . . . in his custody in the Neshoba County Jail . . . would release them from custody at such time that he [and others of the defendants] . . . could and would intercept [the three victims] . . . and threaten, assault, shoot and kill them."

[***HR10] This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required [**1160] by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

[***HR11] [HN5] As we have consistently held "The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals." Williams I, 341 U.S., at 92 (opinion of DOUGLAS, J.). In the present case, the participation by law enforcement [***276] officers, as [*800]alleged in the indictment, is clearly state action, as we have discussed, and it is therefore within the scope of the Fourteenth Amendment.

2. The argument, however, of Mr. Justice Frankfurter's opinion in Williams I, upon which the District Court rests its decision, cuts beneath this. It does not deny that the accused conduct is within the scope of the Fourteenth Amendment, but it contends that in enacting § 241, the Congress intended to include only the rights and privileges conferred on the citizen by reason of the "substantive" powers of the Federal Government -- that is, by reason of federal power operating directly upon the citizen and not merely by means of prohibitions of state action. As the Court of Appeals for the Fifth Circuit in Williams I, relied upon in the opinion below, put it, "the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the . . . Fourteenth Amendment." 179 F.2d 644, 648. We do not agree.

[***HR12]

The language of § 241 is plain and unlimited. As we have discussed, its language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or "flow from" the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution. We agree with the observation of Mr. Justice Holmes in *United States v. Mosley*, 238 U.S. 383, 387-388, that

"The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. . . . This section [*801] dealt with Federal rights and

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

with all Federal rights, and protected them in the lump [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face § 19 [now § 241] most reasonably affords." n8

-----Footnotes-----

n8 See also Mr. Justice Rutledge, concurring in result, in *Screws v. United States*, 325 U.S. 91, 120.

-----End Footnotes-----

[***HR13] We believe, with Mr. Justice Holmes, that the history of the events from which § 241 emerged illuminates the purpose and means of the statute with an unmistakable light. We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language. We are not at liberty to seek ingenious analytical instruments for excluding from its general language the Due Process Clause of the Fourteenth Amendment -- particularly since the violent denial of legal process was one of the reasons motivating enactment of the section. n9

-----Footnotes-----

n9 It would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose -- which remains vital and pertinent to today's problems. As is well known, for many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes were concerned. Its sole office was to impede state regulation of railroads or other corporations. Despite subsequent statements to the contrary, nothing in the records of the congressional debates or the Joint Committee on Reconstruction indicates any uncertainty that its objective was the protection of civil rights. See Stamp, *The Era of Reconstruction, 1865-1877*, 136-137 (1965).

-----End Footnotes-----

Section [**1161] 241 was enacted as part of [***277] what came to be known as the Enforcement Act of 1870, 16 Stat. 140. n10 The Act was passed on May 31, 1870, only a few months [*802] after ratification of the Fifteenth Amendment. In addition to the new § 241, it included a re-enactment of a provision of the Civil Rights Act of 1866 which is now § 242. The intended breadth of § 241 is emphasized by contrast with the narrowness of § 242 as it then was. n11 Section 242 forbade the deprivation, "under color of any law," of "any right secured or protected by this act." The rights protected by the Act were narrow and specific: "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens [and to] be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." Act of May 31, 1870, § 16, 16 Stat. 144, re-enacting with minor changes Act of April 9, 1866, § 1, 14 Stat. 27. Between 1866 and 1870 there was much agitated criticism in the Congress and in the Nation because of the continued denial of rights to Negroes, sometimes accompanied by violent assaults. In response to the demands for more stringent legislation Congress enacted the Enforcement Act of 1870. Congress had before it and re-enacted § 242 which was explicitly limited as we have described. At the same time, it included § 241 in the Act using broad language to cover not just the rights enumerated in § 242, but all rights and privileges under the Constitution and laws of the United States.

-----Footnotes-----

n10 The official title is "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes."

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

n11 The substantial difference in coverage of the two sections as they were in the Act of 1870 precludes the argument that § 241 should be narrowly construed to exclude Fourteenth Amendment rights because otherwise it would have been duplicative of § 242 taken in conjunction with the general conspiracy statute, 18 U. S. C. § 371. If, as we hold, § 241 was intended to cover all Fourteenth Amendment rights, it was far broader in 1870 than was § 242. For other reasons for rejecting the duplication argument, see the opinion of MR. JUSTICE DOUGLAS in *Williams I*, 341 U.S., at 88, n. 2.

-----End Footnotes-----

[*803] It was not until the statutory revision of 1874 that the specific enumeration of protected rights was eliminated from § 242. The section was then broadened to include as wide a range of rights as § 241 already did: "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States." The substantial change thus effected was made with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance. n12 Section 241 was left essentially unchanged, and neither in the 1874 revision nor in any subsequent re-enactment has there been the slightest indication of a congressional intent to narrow or limit the original broad scope of § [HN6] 241. It is clear, therefore, that § 241, from original enactment through subsequent codifications, was intended to deal, as Mr. Justice Holmes put it, with conspiracies to interfere with "Federal rights and with all Federal rights." We find no basis whatsoever for a judgment of Solomon which would give to the statute less than its words command. n13

-----Footnotes-----

n12 See 14 Stat. 74; 17 Stat. 579; S. Misc. Doc. No. 101, 40th Cong., 2d Sess.; H. Misc. Doc. No. 31, 40th Cong., 2d Sess.; S. Misc. Doc. No. 3, 42d Cong., 2d Sess.; 2 Cong. Rec. 646, 648, 1029, 1210, 1461.

n13 The opinion of MR. JUSTICE DOUGLAS in *Williams I*, 341 U.S., at 88, disposes of the argument that the words of § 241 themselves suggest the narrow meaning which the opinion of Mr. Justice Frankfurter found in the section.

-----End Footnotes-----

The [***278] [**1162] purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time. n14 The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. n15 Congress had taken control of the entire [*804] governmental process in former Confederate States. It had declared the governments in 10 "unreconstructed" States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.

-----Footnotes-----

n14 See generally, Stamp, *The Era of Reconstruction, 1865-1877* (1965); Nevins, *The Emergence of Modern America, 1865-1878* (1927).

n15 See H. R. Rep. No. 16, 39th Cong., 2d Sess., p. 12 et seq.

-----End Footnotes-----

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

For a few years "radical" Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. n16 The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man. n17

-----Footnotes-----

n16 Cf. Nevins, *op. cit. supra*, at 351.

n17 See, *id.*, at 352; Morison, *Oxford History of the American People* 722-723 (1965).

-----End Footnotes-----

Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865. Congress, on April 9, 1866, enacted the Civil Rights Act of 1866, which, as we have described, included § 242 in its originally narrow form. On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, [*805] and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.

In this context, it is hardly conceivable that Congress intended § 241 to apply only to a narrow and relatively unimportant category of rights. n18 We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.

-----Footnotes-----

n18 See, for example, *United States v. Waddell*, 112 U.S. 76 (right to perfect a homestead claim); *United States v. Classic*, 313 U.S. 299 (right to vote in federal elections); *Logan v. United States*, 144 U.S. 263 (right to be secure from unauthorized violence while in federal custody); *In re Quarles*, 158 U.S. 532 (right to inform of violations of federal law). Cf. also *United States v. Cruikshank*, 92 U.S. 542, 552; *Hague v. CIO*, 307 U.S. 496, 512-513 (opinion of Roberts, J.); *Collins v. Hardyman*, 341 U.S. 651, 660.

-----End Footnotes-----

This is fully attested by the only [***279] statement explanatory of § 241 in the recorded congressional proceedings relative to its enactment. We refer to the speech of Senator Pool of North Carolina who introduced the provisions as an amendment to the Enforcement Act of 1870. The Senator's remarks are printed in full in the Appendix to this opinion. n19 He urged that the section was needed in order to [**1163] punish invasions of the newly adopted Fourteenth and Fifteenth Amendments to the Constitution. He acknowledged that the States as such were beyond the reach of the punitive process, and that the legislation must therefore operate upon individuals. He made it clear that "It matters not whether those individuals be officers or whether they are acting upon their own responsibility." We find no evidence whatever that Senator Pool intended that § 241 should not cover violations [*806] of Fourteenth Amendment rights, or that it should not include state action or actions by state officials.

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

-----Footnotes-----

n19 We include these remarks only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment rights.

-----End Footnotes-----

We conclude, therefore, that it is incumbent upon us to read § 241 with full credit to its language. Nothing in the prior decisions of this Court or of other courts which have considered the matter stands in the way of that conclusion.

-----Footnotes-----

n20 This Court has rejected the argument that the constitutionality of § 241 may be affected by undue vagueness of coverage. The Court held with reference to § 242 that any deficiency is cured by the requirement that specific intent be proved. *Screws v. United States*, 325 U.S. 91. There is no basis for distinction between the two statutes in this respect. See *Williams I*, 341 U.S., at 93-95 (DOUGLAS, J.).

-----End Footnotes-----

[***HR14] The present application of the statutes at issue does not raise fundamental questions of federal-state relationships. We are here concerned with allegations which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment -- that no State shall deprive any person of life or liberty without due process of law. This is a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis upon civil rights. Even as recently as 1951, when *Williams I* was decided, the federal role in the establishment and vindication of fundamental rights -- such as the freedom to travel, nondiscriminatory access to public areas and nondiscriminatory educational facilities -- was neither as pervasive nor as intense as it is today. Today, a decision interpreting a federal law in accordance with its historical design, to punish denials by state action of constitutional rights of the person can hardly be regarded as adversely affecting "the wise adjustment between State responsibility and national control . . ." *Williams I*, [807]341 U.S., at 73 (opinion of Frankfurter, J.). In any event, the problem, being statutory and not constitutional, is ultimately, as it was in the beginning, susceptible of congressional disposition.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court except insofar as the opinion relies upon *United States v. Williams*, 341 U.S. 58; *United States v. Williams*, 341 U.S. 70; and *Williams v. United States*, 341 U.S. 97.

[***280] APPENDIX TO OPINION OF THE COURT.

Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611-3613):

MR. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of [1164] Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately connected [*808] with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people were taken out from under the protecting hand of interested masters and turned loose to take care of themselves. They were turned loose and put upon their own resources in communities which were imbued with prejudices against them as a race, communities which for the most part had for years past -- indeed from the very time when those who are now in existence were born -- been taught and had instilled into them a prejudice against the equality which has been attempted to be established for the colored citizens of the United States.

Mr. President, the condition which that thirteenth amendment imposed on the late insurrectionary States was one which demanded the serious consideration and attention of this Government. The equality which by the thirteenth, fourteenth, and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of the prejudices which had theretofore existed, but it has raised against them still stronger prejudices and stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people, weak, ignorant, and poor. Those among the white citizens there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is [*809] for that reason not only necessary for the freedmen, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction.

We have heard on former occasions on the floor of the Senate that there were [***281] organizations which committed outrages, which went through communities for the purposes, of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. It speaks of "the right of citizens to vote." It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can [**1165] individuals abridge it with impunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. If our legislation is to apply only to the [*810] States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to individuals. A State might attempt to contravene that provision of the Constitution by passing some positive enactment by which it would be contravened, but the Supreme Court would hold such enactment to be unconstitutional, and in that way the State would be restrained. But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot -- because the courts would prevent it -- by positive legislation, but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.

The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. The civil rights bill recognized all persons born or naturalized in the United States as citizens, and provided that they should have certain rights which were enumerated. They are, "to

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

make and enforce contracts, to sue, be made parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property," and to "the full and equal benefit [***282] of all laws and proceedings for the security of person and property."

[*811] The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, "to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected" by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."

There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of [**1166] the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer [*812] to execute any law of a State by which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. Why can you not just as well extend it to any other citizen of the country?

It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers [***283] charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. I believe the language of the Senate bill is sufficiently large and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting. But, sir, individuals may prevent the exercise of the right of [*813] suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment.

But, sir, there is a great, important omission in this bill as well as in that of the House. It seems not to have struck those who drew either of the two bills that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands. Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the

383 U.S. 787, *, 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation [**1167] or of depositing the ballot in the box. I think the bill cannot be perfected to meet the emergencies of the occasion [*814] unless there be a section which meets that view of the case.

The Senator from Indiana [Mr. Morton] asks whether I have drawn an amendment to that effect. I have, but I cannot offer it at this time, for the simple reason that there is an amendment to an amendment pending.

Mr. MORTON. Let it be read for information.

Mr. POOL. It has been printed, and I send it to the desk to be read for information.

The Chief Clerk read the amendment intended to be proposed by Mr. Pool, as follows:

"Insert after section four of the Senate bill the following sections:

"SEC. 5. And be it further enacted, That it shall be unlawful for any person, with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate, or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory. [***284] Any person violating the provisions of this section shall be held guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court: the fine not to exceed \$1,000, and the imprisonment not to exceed one year.

"SEC. 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, and on conviction thereof shall be fined and imprisoned; the fine not to exceed \$5,000 and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, [*815] profit, or trust created by the Constitution or laws of the United States.

"SEC. 7. And be it further enacted, That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States, as hereinafter provided, for violations of this act, and on conviction thereof shall be punished for the same with such punishments as are attached to like felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

"Strike out section twelve and substitute therefor the following:

"And be it further enacted, That the President of the United States, or such person as he may empower for that purpose, may employ in any State such part of the land and naval forces of the United States, or of the militia, as he may deem necessary to enforce the complete execution of this act; and with such forces may pursue, arrest, and hold for trial all persons charged with the violation of any of the provisions of this act, and enforce the attendance of witnesses upon the examination or trial of such persons."

....

Mr. POOL. The Senator from Indiana asked if I had an amendment prepared which met the view of the case I was presenting in regard to the compelling of citizens to vote in a particular way. The first section of the amendment which I have offered uses this language:

"That it shall be unlawful for any person with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate or attempt to coerce or intimidate any of the [**1168] legally qualified voters in any State or Territory."

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

[*816] But, Mr. President, there is another view which seems to have been lost sight of entirely by those who have drawn both the House bill and the bill now pending before the Senate, and from which we apprehend very much danger. It is this: the oppression of citizens because of having voted in a particular way, or having voted at all. It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers. They may be subjected to outrages of various kinds because they have participated [***285] in an election, and cast their votes in a particular way. That is not done for the purpose of punishment so much as for the purpose of deterring them from voting in any succeeding election, or from voting in a way that those who perpetrate these outrages do not desire them to do. I find that branch of the subject is entirely left out of view in the bill.

There is another feature of my amendment which I deem of some importance. It is this:

"That if in the act of violating any provision in either of the two preceding sections any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States."

I think the most effective mode of preventing this intimidation and these attempts at coercion, as well as the outrages which grow out of these attempts, would be found in making any offense committed in the effort to violate them indictable before the courts of the United States. As was said before, in the discussion of the Georgia question in the Senate, the juries in the communities where these outrages are committed are often composed of men who are engaged in them, or of their friends, or of those who connive at them, or of persons [*817] who are intimidated by them, and in many instances they dare not bring in a true bill when there is an attempt to indict, or if a true bill be found, they dare not go for conviction on the final trial. It is for that reason that I believe it will be better, it will be the only effective remedy, to take such offenders before the courts of the United States, and there have them tried by a jury which is not imbued with the prejudices and interests of those who perpetrate the crimes.

These are the principal features of the amendment which I have drawn in the effort to perfect this bill; and there is another one to which I will call the attention of the Senate. It is that in regard to calling out the military forces of the United States. I find that in the civil rights bill, as in the bill which has been introduced by the Senate Judiciary Committee, the President is authorized, either by himself or by such person as he may empower for that purpose, to use the military forces of the United States to enforce the act. There in both instances it stops. It has been objected to here that the expression, "or such other person as he may empower for that purpose," should not be in the bill; that it may be subject to abuse. I think it would have no good effect to keep that language in. The President may send his officers and he may empower whomsoever he pleases to take charge of his forces without any such provision.

But there is a use for these forces which seems not to have been adverted to in either the civil rights bill or in the bill that is now pending before the Senate. It is the holding of these offenders for examination and trial after they are arrested. Their confederates, if they are put in the common prisons of the State, will in nine cases out of ten release them. But more important still is it to use these forces to compel the attendance of witnesses; for a subterfuge resorted to is to keep witnesses away [*818] from the trial. In many instances witnesses are more or less implicated [**1169] in the commission of the offense. In other cases the witnesses are intimidated and cannot be obtained upon the [***286] trial. So in the amendment which I have prepared I have proposed that these forces may be used to enforce the attendance of witnesses both upon the examination and the trial. My purpose in introducing this was to perfect the Senate bill. I think, as I said yesterday, that that bill is liable to less objection than the House bill. I think it is more efficacious in its provisions. I think it is better that the Senate should direct its attention to perfecting that bill, in order that it may be made, when perfected, a substitute for the bill that came from the House.

That much being said upon the purpose of perfecting the bill and making it efficacious, I have very little more to say. I did not intend when I rose to say much upon the general power, which has been questioned here, to pass any law at all. I think it is better to do nothing than to do that which will not have the proper effect. To do that which will not accomplish the purpose would be worse than doing nothing at all. That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our

383 U.S. 787, *; 86 S. Ct. 1152, **;
16 L. Ed. 2d 267, ***; 1966 U.S. LEXIS 1963

legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

[*819] I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union. I think this question will come time and again as years pass by, perhaps before another year, in different forms before the Senate. It is well that we should deal with it now and deal with it squarely, and I hope that the Senate will not hesitate in doing so.

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.

Upon that ground the Republican party must stand in carrying into effect the reconstruction policy, or the whole fabric of reconstruction, with all the principles connected with it, amounts to nothing at all; and in the end it will topple and fall unless it can be enforced by the appropriate legislation, the power to enact which has been provided in [***287] each one of the great charters of liberty which that party has put forth in its amendments to the Constitution. Unless the right to enforce it by appropriate legislation is enforced stringently and to the point, it is clear to my mind that there will be no efficacy whatever in what has been done up to this time to carry out and to establish that policy.

[*820] I did not rise, sir, for the purpose of arguing the question very much in detail. [**1170] I did not rise for the purpose of making any appeals to the Senate; but more for the purpose of asserting here and arguing for a moment the general doctrine of the right of the United States to intervene against individuals in the States who attempt to contravene the amendment to the Constitution which we are now endeavoring to enforce, and for the purpose of calling attention to the defects in the bill and offering a remedy for them.

REFERENCES:

Annotation References:

Criminal liability under federal statutes for depriving, or conspiring to deprive, a person of his civil rights. 95 L ed 780.

UNIVERSITY OF BALTIMORE v. PERI IZ
No. 828, SEPTEMBER TERM, 1997

COURT OF SPECIAL APPEALS OF MARYLAND

123 Md. App. 135; 716 A.2d 1107; 1998 Md. App. LEXIS 158;136 Lab. Cas. (CCH) P58,492

September 3, 1998, Filed

PRIOR HISTORY: APPEAL FROM THE Circuit Court for Baltimore City. Richard T. Rombro, JUDGE

DISPOSITION: [***1] APPELLANT'S MOTION TO DISMISS AND MOTION TO STRIKE ARE HEREBY DENIED; JUDGMENT REVERSED; COSTS TO BE PAID BY APPELLEE.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee teacher filed suit against appellants, university and officers, for violation of the Equal Protection Clause, other civil rights claims, and breach of contract arising out of the denial of a promotion and tenure. The Circuit Court for Baltimore City (Maryland) entered judgment for the teacher on the contract claims but found for the university and officers on all other claims. The teacher and university appealed.

OVERVIEW: The teacher asserted that the university had breached its contract with her by considering collegiality as a criterion in her promotion and tenure review and by holding her to a higher standard because she had sought early tenure review. The university argued that the trial court erred in failing to rule, as a matter of law, that collegiality was a factor that may have been considered even though it was not expressly included in the contract or in the university's promotion and tenure policy. The court reversed the judgment, holding that the trial court erred in refusing to grant the university's motion for judgment as a matter of law. In so doing, the court stated that (1) collegiality was an appropriate consideration in the context of the teacher's review for tenure and promotion, (2) the contract did not guarantee an award of tenure, and the teacher received the review to which she was contractually entitled, and (3) upon the jury's determination that the teacher was not the victim of unlawful discrimination, and because there was also insufficient evidence that the university failed to follow its tenure review procedures, judgment should have been entered for the university.

OUTCOME: The university's motion to dismiss and motion to strike were denied. The judgment in favor of the teacher was reversed. Costs were taxed to the teacher.

CORE TERMS: tenure, promotion, recommendation, faculty, collegiality, provost, faculty member, teaching, candidate, breach of contract, colleague, fair dealing, dean, qualifications, rank, breached, tenured, higher standard, review process, covenant, employment contract, voted, subjective, implied covenant, faculty members, matter of law, appointment, recommended, contractual, personnel

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Summary Judgment: Summary Judgment Standard

Civil Procedure: Trials: Judgment as Matter of Law

[HN1] When the court reviews a trial court's denial of a party's motion for judgment in a jury trial, the court conducts the same analysis as the trial court. The court considers all of the evidence, including the inferences reasonably and logically drawn therefrom, in a light most favorable to the non-moving party. If there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the court may affirm the trial court's denial of the motion. On the other hand, where the evidence is not such as to generate a jury question, i.e., permits but one conclusion, the question is one of law and the motion must be granted. Likewise, when the court reviews denial of a motion for judgment notwithstanding the verdict, the court uses the same standard as a motion for judgment made during trial. The

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

court assumes the truth of all credible evidence and all inferences of fact reasonably deducible from the evidence that supports the non-moving party's position.

Contracts Law: Types of Contracts: Employment Contracts

[HN2] Tenure denotes a commitment by the school, as a direct or implied part of its faculty employment agreement, that, upon a determination that the faculty member has satisfied the conditions established by the school, the member's employment will be continuous, subject to termination only for adequate cause. A tenured faculty member may be terminated for reasons not personal to the faculty member, however. Tenure may be afforded in many ways, including by law, by contract, or by academic code. It is not the function of a federal court to second-guess the decision of a school official on matters within his discretion which do not rise to the level of a constitutional deprivation.

Governments: State & Territorial Governments: Employees & Officials

Contracts Law: Types of Contracts: Employment Contracts

[HN3] Final authority for the appointment, promotion, and granting of tenure of faculty resides in the chief executive officer of the institution. Such authority is also provided by statute. Md. Code Ann., Educ. § 12-109(e)(4) states that the respective presidents of the University of Maryland System's constituent institutions shall appoint, promote, fix salaries, grant tenure, assign duties, and terminate personnel.

Governments: State & Territorial Governments: Employees & Officials

Contracts Law: Types of Contracts: Employment Contracts

[HN4] Collegiality is a legitimate factor for consideration in the promotion and tenure review process.

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review

Contracts Law: Contract Interpretation: Interpretation Generally

[HN5] The interpretation of a contract is a question of law. If the contract is clear and unambiguous, there is no room for construction; the court must presume the parties intended what they said in the express terms of the agreement. On the other hand, when the contract language is ambiguous, the meaning of the contract is a question to be determined by the trier of fact. In deciding whether the contract is ambiguous, the court may not resort to extrinsic evidence if it will alter the plain meaning of the writing. Instead, the court is confined to a review of the contract language itself; it must consider what a reasonable person in the position of the parties would have thought it to mean. The court will not reverse the trial court's threshold determination that a contract is ambiguous unless the trial court's decision is clearly erroneous. Md. R. App. Review, Ct. App. 8-131(c).

Contracts Law: Contract Interpretation: Interpretation Generally

[HN6] "Collegiality" is defined as the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests. It is also defined as "the relationship of colleagues."

Education Law: Departments of Education: State Departments of Education: Authority

Contracts Law: Types of Contracts: Employment Contracts

[HN7] Although not expressly listed as one of the tenure criteria, it is inescapable that collegiality is an appropriate consideration. Personality factors or collegiality are, of course, part of teaching and service.

Education Law: Discrimination: Gender & Sex Discrimination: Title IX: Coverage

[HN8] Collegiality may not be used as a pretext for discrimination.

Education Law: Departments of Education: State Departments of Education: Authority

Contracts Law: Types of Contracts: Employment Contracts

[HN9] A faculty member who satisfies qualifications in every category is not necessarily assured the award of tenure. Colleges and universities typically enjoy wide discretion because of the varied considerations that affect the tenure decision, regardless of the merit of the individual candidate.

Education Law: Departments of Education: State Departments of Education: Authority

Contracts Law: Types of Contracts: Employment Contracts

[HN10] When a tenure process is established in writing and is communicated to a prospective appointee, a subordinate official may not circumvent that process and bind the college to a tenure arrangement.

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Contracts Law: Types of Contracts: Employment Contracts

[HN11] Policy provisions that limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee. Not all personnel policies contained in employee manuals create enforceable contractual rights. General statements of policy are no more than that and do not meet the contractual requirements of an offer. Personnel policies that specifically prescribe and limit the procedures that an employer must use in filling vacant positions, but do not prescribe with whom they are to be filled, do not rise to the level of contractual undertakings. And they are not elevated to that status by allegations that one of the applicants is more qualified than the other applicants.

Contracts Law: Contract Interpretation: Good Faith & Fair Dealing

Contracts Law: Types of Contracts: Employment Contracts

[HN12] If an employer has contracted to do something that requires it to exercise its discretion, then it must exercise that discretion in good faith. Absent evidence of bad faith on the part of an employer, courts should be reluctant to overturn an employer's decision to discharge an employee when the employer has complied with its own procedures for resolving employment matters.

Education Law: Departments of Education: State Departments of Education: Authority

Civil Procedure: Jurisdiction

[HN13] The court has no jurisdiction to review the factual determinations of a college's governing body unless it can be clearly demonstrated that that body violated its procedures.

COUNSEL: ARGUED BY Dawna M. Cobb, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General on the brief) both of Baltimore, MD., FOR APPELLANTS

ARGUED BY Peri Iz of Columbia, MD. FOR APPELLEE.

JUDGES: Moylan, Hollander, Smith, Marvin H. (Retired, Specially Assigned) JJ. Opinion by Hollander, J.

OPINIONBY: HOLLANDER

OPINION:

[*140] [**1110] Opinion by Hollander, J.

Filed: September 3,1998

This appeal concerns the decision of the University of Baltimore (the "University"), appellant and cross-appellee, to deny tenure and promotion to Peri Iz ("Dr. Iz"), appellee and cross- appellant. n1 Appellee filed suit in the Circuit Court for Baltimore City against the University; its President, H. Mebane Turner ("President Turner"); its Provost, Ronald Legon; and former Dean of the Business School, Daniel Costello (collectively, the "Officers"). n2 In her second amended complaint, Dr. Iz alleged that the Officers violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. With respect to the University, Dr. Iz claimed that it violated the [*141] Civil Rights Act of 1964, breached its contract with Dr. Iz, and breached the implied covenant of good faith and fair dealing. [***2]

-----Footnotes-----

n1 Dr. Iz was represented below by counsel, but is pro se on appeal.

n2 The Officers are not parties to this appeal.

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

-----End Footnotes-----

After a three week trial in July 1996, the jury found in favor of the University and the Officers on the civil rights and state and federal constitutional claims, but found in favor of Dr. Iz on the contract claims lodged against the University. The jury awarded appellee \$425,000.00 in damages. After the parties' post trial motions were denied, the University timely noted its appeal. It presents four questions for our review, which we have reframed and reordered:

I. Did the trial court err in refusing to grant appellant's motion for judgment as a matter of law? n3

-----Footnotes-----

n3 This "question" actually reads:

The jury's verdict is not supported by sufficient evidence because Dr. Iz's inability to work cooperatively with her colleagues was appropriately considered in her tenure review and because there was no evidence that the University acted unreasonably when it considered Dr. Iz for tenure and promotion to the rank of Associate Professor.

A. Considering Dr. Iz's lack of collegiality did not breach her contract with the University.

B. The evidence in support of the claim for breach of implied covenant of good faith and fair dealing did not create a jury question.

-----End Footnotes-----

[***3]

II. Did the trial court err in permitting appellee to testify as an expert on damages when she had not been named as an expert witness pursuant to the court's scheduling order for disclosure of experts?

III. Was the jury's award of \$425,000.00 in damages excessive and speculative?

IV. Does sovereign immunity bar a claim for breach of the implied covenant of good faith and fair dealing?

In her cross-appeal, appellee presents one question for our consideration, which we have rephrased:

[**1111] Did the trial court err in refusing to award specific performance of the contract?

In addition, the University has moved to dismiss appellee's cross-appeal as untimely filed. It has also moved to strike part of Dr. Iz's reply brief on the ground that it exceeds the [*142] scope of the University's response to the issue raised by Dr. Iz on her cross-appeal.

We shall answer appellant's first question in the affirmative. Therefore, we need not address appellant's remaining issues or the issue presented on the cross-appeal. Moreover, we shall deny appellant's motions. Accordingly, for the reasons that follow, we shall reverse.

Factual Background

The parties agree on most[***4] of the facts. Dr. Iz holds a Ph.D. in Decision Sciences, and her expertise lies in the study of decision-making in a business context. In 1989, the University hired Dr. Iz as a visiting assistant professor under a one-year contract. She was appointed to the University's Merrick School of Business (the "School" or "Merrick") in the Information and Qualitative Sciences ("IQS") Department.

In 1990, Dr. Iz received a tenure track contract. The agreement provided that she would be reviewed for tenure in the 1993 academic year in accordance with the terms and conditions of the University of Maryland System's Board of

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***, 136 Lab. Cas. (CCH) P58,492

Regents' policy on appointment, rank, and tenure. The University of Maryland System's policy, in turn, requires each of its institutions to develop written procedures and criteria governing the promotion and tenure process. The University of Maryland System's policy also states:

The terms described in the letter of appointment, together with the policies reproduced in the designated portions of the faculty handbook, shall constitute a contractually binding agreement between the institution and the appointee.

The University of Maryland System's tenure policy also provides[***5] that the President of the University is the only official actually authorized to award tenure and promotion to a faculty member. Such authority is also provided in Md. Code (1978, 1997 Repl. Vol., 1997 Cum. Supp.), § 12-109(e)(4) of the Education Article ("Educ.").

After the University discovered a miscalculation of Dr. Iz's initial tenure review date, the contract was amended to change [*143] the tenure review date to the 1994 academic year. Nevertheless, Merrick's policy permitted Dr. Iz to seek early tenure review without penalty. Against the advice of her tenured colleagues in the IQS Department, Dr. Iz decided to undergo tenure review in academic year 1993, one year earlier than provided in her contract.

Merrick's policy does not appear to require a vote on whether to recommend early tenure review. Nevertheless, in a memorandum to Dean Costello, Dr. Milton Jenkins, the chair of the IQS Department, stated that he "needed a letter signed by the department's tenured faculty concerning [Dr. Iz's] request for a change of [tenure review] date." In September 1993, by secret ballot, the tenured IQS faculty voted five to one, with one abstention, to recommend against early review. After[***6] learning of the IQS faculty's decision, Dean Costello also recommended against early review. Consequently, Dr. Iz appealed to the provost and President Turner to obtain early review. President Turner informed Dr. Iz that she could seek early review, but he advised Dr. Iz that if she were denied tenure, she would not receive another review. Because Dr. Iz persisted in undergoing early review, Provost Legon instructed the School, in the fall of 1993, to consider her for tenure and promotion to the rank of associate professor.

At Merrick, a faculty member seeking tenure and promotion submits his or her credentials in a portfolio for review by several groups and individuals. The procedures and time frame for each step in the review process are included in the School's policies and procedures. The faculty member is evaluated by: (1) the professor's tenured colleagues who hold the desired rank or higher; (2) the department chairperson; (3) the Tenure and Promotion ("T and P") Committee, a ten member panel consisting of two members from each of Merrick's five departments; (4) the dean; (5) the provost; and (6) the president.

[**1112] If the provost recommends against tenure, the faculty member may [***7] appeal the recommendation to the University-wide [*144] Faculty Appeals Committee (the "FAC"), consisting of seven tenured faculty members. If an appeal is made to the FAC, it may interview witnesses and review documents, after which it may make one of the following recommendations to the president:

1. follow the provost's recommendation;
2. reverse the provost's recommendation;
3. send the case back to an appropriate earlier stage of the tenure and promotion process for reconsideration.

The FAC may not substitute its judgment for those involved in the tenure review process, however.

At the first stage of review, Dr. Iz's tenured colleagues in the IQS Department considered whether to recommend her for tenure and promotion. According to the written report of the IQS tenured faculty, they voted three to two against tenure, with one abstention. They also voted five to one against promotion. n4 Their written report relied heavily on the Department's recent review of Dr. Iz's accomplishments in the areas of teaching, research, and service, and noted that Dr. Iz "has been showing progress and would have a stronger case next year." Dr. Rao Vemuganti, the former IQS Department[***8] chairperson, who held the position for 17 years and had hired Dr. Iz, e-mailed his vote while he was away on sabbatical; he recommended against tenure and promotion. Dr. Vemuganti opined that, although Dr. Iz was a good teacher, had publications, and was involved in professional activities, he was concerned about "her attitude and collegiality."

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

-----Footnotes-----

n4 Appellee contests the numbers contained in the report, and cites the deposition and trial testimony of three tenured faculty members who said they voted in favor of tenure for Dr. Iz. Dr. Iz also argues that, when considering the vote of Dr. Jenkins, the IQS Department chairperson, she received four votes in favor of tenure.

-----End Footnotes-----

While the tenured IQS faculty was reviewing Dr. Iz's portfolio, Dr. Jenkins was conducting his review. Contrary to the recommendation of the IQS faculty, Dr. Jenkins recommended the award of tenure and a promotion, stating that Dr. Iz met [*145] or exceeded the necessary qualifications. Dr. Jenkins's recommendation was forwarded to the T and P Committee. [***9]

The T and P Committee voted six to four in favor of tenure and five in favor and five opposed to promotion to associate professor. Half of the Committee found Dr. Iz's teaching to be "good," while the other half found it to be "satisfactory." Moreover, the T and P Committee found Dr. Iz's accomplishments in research were "very good" and that her record of service was "good." Following the T and P Committee's review, all three recommendations were forwarded to Dean Costello and to Dr. Iz.

Dean Costello recommended against tenure and promotion. Although he believed that Dr. Iz met or exceeded the qualifications for research and service, he thought she did not meet the qualifications for teaching. He also observed that Dr. Iz was reluctant to accept "peer evaluation" and that her colleagues had "strongly recommended that she not apply early for tenure and promotion." Dean Costello's recommendation was then sent to Provost Legon and Dr. Iz.

Dr. Iz provided a written response to Dean Costello's report, disputing many of his observations. She also met with Provost Legon to discuss the Dean's recommendation. Before making his recommendation, the provost met with Dr. Jenkins, the Chair[***10] of the IQS Department. Provost Legon asked Dr. Jenkins to clarify statements made in his recommendation concerning Dr. Iz's disagreements with colleagues. The provost also sought to substantiate Dean Costello's concern that Dr. Iz was reluctant to accept peer evaluation. Dr. Jenkins responded in writing that Dr. Iz was inflexible, defensive, and unwilling to take constructive advice. Further, he explained that he did not raise these concerns in his recommendation because he did not believe that Dr. Iz's behavior could be considered in the tenure review process.

After reviewing the recommendations and the information provided by Dr. Iz and Dr. Jenkins, Provost Legon recommended that [***113] Dr. Iz be denied tenure and promotion. Although the provost acknowledged Dr. Iz's strengths in research [*146] and service, he commented on her difficulties with her IQS colleagues. Nevertheless, he acknowledged that he could not determine who was right or wrong, or whether this merely represented "an acceptable level of professional disagreement."

Upon receiving Provost Legon's recommendation, Dr. Iz met with President Turner. She informed President Turner that she would appeal the provost's recommendation[***11] to the FAC. In discussing her disappointment with the negative recommendations that she had received, Dr. Iz accused male colleagues of making inappropriate remarks to her. She also claimed that she had learned that colleagues had used foul language in her absence when discussing her at a faculty meeting. Although Dr. Iz told President Turner about the remarks that had been disclosed to her, she did not reveal the identities of those persons who had allegedly made them.

Dr. Iz, who is Turkish, appealed the provost's recommendation on several grounds, including discrimination on the basis of gender and national origin. Before deliberating, the FAC reviewed documents and heard from Dr. Iz, Provost Legon, Dr. Jenkins, and other witnesses. Four members then voted to reverse the provost, two voted to follow the recommendation, and one voted to reconsider the case. Those who recommended against following the provost's recommendation believed that Dr. Iz's review had been unfair because it considered her lack of collegiality, a criterion

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

not expressly set forth in the tenure review policy. The FAC found no evidence of gender discrimination, although it did conclude that Dr. Iz had been the[***12] victim of "personality discrimination," which created an unfair review process.

President Turner received the FAC's recommendation on May 2, 1994. Before making his decision, President Turner met with several people involved in reviewing Dr. Iz for tenure and promotion. He also carefully explored the process. For example, he asked for information about student evaluations; he inquired of Dr. Iz's female colleagues in the IQS Department to determine whether they had experienced discrimination, [*147] to which they replied that they had not; he asked the chairperson of the T and P Committee if the process had been fair to Dr. Iz, to which she responded that it had. President Turner also met with many members of the FAC and learned that Dr. Iz had revealed to them the identities of two male colleagues who had allegedly made inappropriate remarks to her. President Turner then spoke with both men, who denied that they had made such remarks. President Turner also conferred with Dr. Jenkins, who was present at the meeting when Dr. Iz alleged that foul language had been used in her absence during a discussion about her. Dr. Jenkins contended that the allegation was false.

After reviewing the[***13] recommendations, President Turner concluded that the review process had been fair and that the alleged inappropriate conduct either could not be corroborated or had not occurred. Therefore, based on a lack of support from the IQS Department, President Turner decided not to award tenure or promotion to Dr. Iz.

Dr. Iz was advised of the decision on May 27, 1994, and was advised that her terminal year as a faculty member would be academic year 1994-95. She continued teaching at the University through June 1995. In the fall of 1995, Dr. Iz signed a two year contract to teach at Hong Kong Baptist University as an associate professor. On January 30, 1995, while in her remaining year at the University, appellee filed her original complaint in this case.

The case came to trial in July 1996; it lasted for three weeks and included testimony from 27 witnesses. Of significance here, Dr. Iz asserted that the University had breached its contract with her by considering collegiality as a criterion in her promotion and tenure review and by holding her to a higher standard because she had sought early tenure review.

During Dr. Iz's direct examination, the court permitted her to testify, over appellant's[***14] objection, as an expert witness in the field of economics. The court rejected appellant's [*114] argument that Dr. Iz should not be permitted to testify as an expert merely because she had not been identified as an [*148] expert witness before trial. Consequently, Dr. Iz testified about the present value of the future lost income that she sought as compensatory damages.

On July 30, 1996, the jury returned a special verdict. The verdict sheet did not distinguish between a breach of the covenant of good faith and fair dealing and breach of contract, however. Instead, it asked: "Do you find that the University of Baltimore breached Dr. Iz's employment contract?" According to the verdict sheet: (1) the jury did not find that Dr. Iz's sex was a determining factor in the University's denial of tenure or promotion; (2) the jury did not find that Dr. Iz's charge of discrimination or reports of discrimination to her supervisors was a determining factor in any retaliatory action; (3) the jury did not find that any of the Officers had violated Dr. Iz's right to equal protection under the United States Constitution or Article 24 of the Maryland Declaration of Rights; (4) the jury did find that the University[***15] had breached Dr. Iz's employment contract. As noted previously, the jury awarded Dr. Iz \$425,000.00 in damages for the breach of contract.

Thereafter, both parties filed post-trial motions. Appellee filed a motion seeking specific performance of her contract, and the University and the Officers collectively filed motions seeking judgment notwithstanding the verdict, remittitur, or a new trial. Those motions were denied on September 20, 1996. Appellant filed a notice of appeal on October 18, 1996. Thereafter, appellee filed her cross-appeal, contesting the trial court's denial of her motion for specific performance.

We will include additional facts in our discussion.

Discussion

I.

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Appellant argues that the trial court erred in denying its motion for judgment as well as its motion for judgment notwithstanding the verdict. Essentially, appellant contends the following: (1) the trial court erred in failing to rule, as a matter of law, that collegiality is a factor that may be considered [*149] in promotion and tenure review even though it is not expressly included in the contract or in the University's promotion and tenure policy; (2) there was insufficient evidence[***16] to support appellee's claim that she was held to a higher standard because she sought early tenure review; and (3) there was insufficient evidence to support a finding that appellant violated the implied covenant of good faith and fair dealing.

[HN1] When we review a trial court's denial of a party's motion for judgment in a jury trial, we conduct the same analysis as the trial court. *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 189, 702 A.2d 422 (1997), cert. denied, 349 Md. 104, 707 A.2d 89 (1998); *James v. General Motors Corp.*, 74 Md. App. 479, 484-85, 538 A.2d 782, cert. denied, 313 Md. 7, 542 A.2d 844 (1988). We consider all of the evidence, including the inferences reasonably and logically drawn therefrom, in a light most favorable to the non-moving party. *Nationwide*, 118 Md. App. at 189; *James*, 74 Md. App. at 484. If there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, we may affirm the trial court's denial of the motion. *Nationwide*, 118 Md. App. at 189; *Washington Metro. Area Transit Auth. v. Reading*, 109 Md. App. 89, 99, 674 A.2d 44 (1996). "On the other hand, where the evidence is not such[***17] as to generate a jury question, i.e., permits but one conclusion, the question is one of law and the motion must be granted." *James*, 74 Md. App. at 484. Likewise, when we review denial of a motion for judgment notwithstanding the verdict, we use the same standard as a motion for judgment made during trial. *Nationwide*, 118 Md. App. at 190; *Houston v. Safeway Stores, Inc.*, 109 Md. App. 177, 182-83, 674 A.2d 87 (1996), rev'd on other grounds, 346 Md. 503, 697 A.2d 851 (1997). Thus, we assume the truth of all credible evidence and all inferences of fact reasonably deducible from the evidence that supports the non-moving party's position. *Nationwide*, 118 Md. App. at 190-91.

[*150] [**1115] In its instructions to the jury, the trial court crystallized the parties' respective arguments:

[Dr. Iz] . . . claims that her employer, the Defendant, University of Baltimore, violated her employment contract by evaluating her tenure and promotion application under criteria other than the criteria of research, teaching, and service set forth in the contract. Dr. Iz also claims that the University of Baltimore violated the implied covenant of good faith and fair dealing in her employment contract[***18] by knowingly denying her tenure and promotion . . .

* * * *

. . . I instruct you that a contract is an agreement between two or more parties creating rights or obligations. I instruct you that, as a matter of law, [Dr. Iz] has an employment contract with the University of Baltimore.

A contract contains promises that parties to the contract agree to be bound by. A promise is an expression by words that the person will perform or not perform certain acts in accordance with their promise. Contracts may also require interpretation. A contract is to be interpreted so as to give effect to the parties' intention at the time the contract was made. Usually, these intentions are shown by the words and terms used or not used in the contract. Words and terms are given their ordinary meaning unless that would cause an unreasonable result. Each sentence should be interpreted in view of the other sentences. Any ambiguities in the contract should be resolved against the person who drew the contract, in this case the University.

I instruct you as a matter of law that [Dr. Iz's] employment contract with the University of Baltimore incorporated the tenure and promotion policies of the[***19] University of Maryland system, the University of Baltimore, and the Merrick School of Business.

Dr. Iz claims that under her contract the University of Baltimore was required to judge her tenure and promotion application solely by the three explicit criteria of research, teaching, and service set forth in the tenure and promotion [*151] policies. [Dr. Iz] also claims that the University was required to judge her application for early tenure on the same standards as those applied to all other applications.

The Defendants claim that the concept of collegiality, as defined by the witnesses, is included in the criteria of teaching, research, and services mentioned in the policies and thus is inherently a part of the contract. The Defendants

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

also claim that no higher standard was used to review [Dr. Iz's] tenure and promotion application than was used for all tenure and promotion candidates with similar qualifications.

You must, therefore, find for [Dr. Iz] on her breach of contract claim if you find that the tenure and promotion policies provide that criteria for tenure and promotion are research, teaching, and service only and that [Dr. Iz's] tenure and promotion application was judged[***20] on criteria other than research, teaching and services. You must also find for [Dr. Iz] on the breach of contract claim if you find that the tenure application was judged by a higher standard because it was early and that the tenure and promotion policies do not provide that the standards to be applied are higher if the tenure application is early.

If the plaintiff does not prove either that the University of Baltimore breached her employment contract by judging her application for . . . tenure and promotion on a basis other than research, teaching, and service, or that the University of Baltimore breached her employment contract by judging her tenure application by a higher standard because it was early, then your verdict must be for the . . . University of Baltimore, on this breach of contract claim.

I instruct you that there exists an implied covenant of good faith and fair dealing in the contract between [Dr. Iz] and her employer, the defendant University. That covenant required [Dr. Iz] and the University to act in good faith towards and deal fairly with each other in regard to their employment relationship.

In this case, [Dr. Iz] claims that the University willfully[***21] breached the covenant [**1116] of good faith and fair dealing by [*152] knowingly denying her tenure and promotion on the basis of an unfair discriminatory evaluation process. Your verdict must be for [Dr. Iz] and against the University on her claim for breach of covenant of good faith and fair dealing if you find that the University of Baltimore unreasonably denied [Dr. Iz] her promotion and tenure and did so in bad faith.

If you find that the University acted reasonably in evaluating and denying [Dr. Iz] tenure and a promotion, then your verdict must be for the University on [Dr. Iz's] claim of breach of covenant of good faith and fair dealing.

II.

We recently discussed the term "tenure" in *Johns Hopkins University v. Ritter*, 114 Md. App. 77, 80-82, 689 A.2d 91 (1996), cert. denied, 346 Md. 28, 694 A.2d 950 (1997). There, Chief Judge Wilner, writing for the Court, said:

Tenure is a serious matter for both the college and the faculty. . . .

. . . It binds the college to a commitment of continuous employment, however poor the faculty member's teaching, research, or administrative skills may become and however much controversy or embarrassment the faculty member may later[***22] bring upon the college because of his or her academic conduct or pronouncements. Perhaps for that reason, it is generally reserved for only the higher faculty ranks and is granted only after a multi-step process designed to assure that the applicant is academically, personally, and temperamentally qualified to be placed in that protected status. It is noteworthy as well that the review process ordinarily involves persons other than those who recruited the faculty member, thereby assuring an objective and more detached examination of the candidate's qualifications.

689 A.2d at 94-95 (citations omitted) (emphasis added).

Moreover, [HN2] tenure "denotes a commitment by the school, as a direct or implied part of its faculty employment agreement, that, upon a determination that the faculty member [*153] has satisfied the conditions established by the school, the member's employment will be continuous, subject to termination only for adequate cause." 114 Md. App. at 80-81; see also *Board of Community College Trustees v. Adams*, 117 Md. App. 662, 702, 701 A.2d 1113, cert. denied, 347 Md. 681, 702 A.2d 290 (1997). A tenured faculty member may be terminated for reasons not personal to the[***23] faculty member, however. See, e.g., *Adams*, 117 Md. App. at 714; *Krotkoff v. Goucher College*, 585 F.2d 675, 679-80 (4th Cir. 1978); see also *Gardiner v. Tschechtelin*, 765 F. Supp. 279 (D. Md. 1991) (holding State violated neither Contracts Clause nor Due Process Clause of the United States Constitution when it took over financially troubled City College and abrogated tenure of faculty members).

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Tenure systems are based, to some extent, on the 1940 Statement of Principles and Interpretive Comments developed by the Association of American Colleges and the American Association of University Professors. Nevertheless, there is no uniform tenure system. Tenure may be afforded in many ways, including by law, by contract, or by academic code. Ritter, 114 Md. App. at 82; see generally *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981) (explaining tenure, its origins, its effects on faculty members and universities, and the subjective nature of the process), cert. denied, 459 U.S. 830, 74 L. Ed. 2d 69, 103 S. Ct. 69 (1982).

In dicta, the Ritter Court recognized that the award of tenure involves a large degree of subjectivity that is somewhat tempered by the several[***24] layers of review involved in the process. In that case, we considered whether Hopkins had breached its contract with the appellees when it discharged them, notwithstanding an alleged promise to hire them as full professors. Hopkins defended on the grounds that (1) the employment contract did not include a commitment to full professorship; and (2) in the alternative, the person negotiating the contract had no authority to make such a promise. The jury returned with a verdict in favor of the appellees and awarded damages of more than \$800,000. We reversed on the ground that the employee [**1117] who made the contract with the [*154] appellees did not have authority to do so. Ritter, 114 Md. App. at 98.

As we have discovered through our own research, many cases decided by the courts of other states underscore the wide discretion inherent in the tenure process. These cases also amply demonstrate the courts' general reluctance to become ensnared in an academic institution's decision with regard to tenure.

In *Stern v. University of Oklahoma Board of Regents*, 841 P.2d 1168 (Okla. Ct. App. 1992), the court reversed a grant of summary judgment in favor of a faculty member who alleged breach of[***25] contract and a constitutional claim after she was denied tenure. The handbook governing tenure criteria called for an evaluation of the candidate's performance in teaching, service or creative achievement, professional service, and university service. The tenure committee recommended against tenure because the faculty member's research was deficient. The trial court concluded that the tenure committee's independent evaluation of the faculty member's scholarship did not adhere to the prescribed evaluation procedures in the handbook and thus constituted a breach of the faculty member's contract and a violation of her due process rights. The appeals court held that the trial court erred in determining that a qualitative evaluation of the faculty member's scholarship violated the policies set forth in the handbook on tenure. In reversing the trial court, the appeals court observed:

Courts must take special care to preserve a university's autonomy in making lawful tenure decisions when reviewing tenure cases. Because tenure decisions require subjective judgments regarding candidates' qualifications and because of the long-term commitment a decision of tenure necessarily entails, courts [***26]should be wary of intruding into the world of university tenure decisions, absent discrimination or other unlawful action by the university.

Id. at 1172 (citation omitted).

What the court said in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), is also noteworthy:

[*155] In view of the substantial commitment a university makes to an individual by granting him tenure, universities have a strong need for, and traditionally have enjoyed a wide discretion in, exercising what is largely a subjective judgment in deciding to whom to grant tenure. By specifying in writing the usual criteria for promotion--teaching, scholarship, service--a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure.

Id. at 422 (emphasis added).

Similarly, the court in *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247 (Pa. Super. Ct. 1986), aff'd, 516 Pa. 291, 532 A.2d 399 (Pa. 1987), observed:

The evaluation of the performance of a college professor and of his or her suitability to[***27] the educational needs, goals and philosophies of a particular institution necessarily involves many subjective, nonquantifiable factors. The assessment of these factors is best performed by those closely involved in the life of the institution, not by judges. It is

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

with good reason that the College retains discretion not to reappoint nontenured faculty members. Even if the faculty member's performance has been exemplary, measured by the most objective yardstick possible, the institution may wish to hire another person because, for example, an individual with superior qualifications has become available, or the institution decides that this particular faculty member does not mesh with the institution's educational goals and philosophies, however excellent his work and distinguished his scholarship. As a matter of sound public policy an institution of higher learning should be free to make such decisions. We believe that engrafting a right to judicial second-guessing of the soundness of personnel decisions made under contracts such as [appellant's] would hamper this decision-making freedom.

504 A.2d at 256-57 (emphasis added); see also *Beitzell v. Jeffrey*, 643 F.2d 870, [***28] 875 (1st Cir. 1981) ("The initial decision [*156] to grant tenure, [**1118] like various other academic matters, typically calls for the exercise of subjective judgment, confidential deliberation, and personal knowledge of both the candidate and the university community."); *Shaw v. Board of Trustees*, 549 F.2d 929, 932 (4th Cir. 1976) ("We will not second guess [school boards] on matters within their discretion that do not rise to the level of constitutional deprivations."); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); *Erickson v. New York Law Sch.*, 585 F. Supp. 209, 212 (S.D.N.Y. 1984) (same); *Cherry v. Burnett*, 444 F. Supp. 324, 332 (D. Md. 1977) ("It is not the function of a federal court to second-guess the decision of a school official on matters within his discretion which do not rise to the level of a constitutional deprivation."); *Henry v. Delaware Law Sch.*, 1998 WL 15897, No. CIV.A. 8837, slip op. at 6 (Del. Ch. Jan. 12, 1998) (noting reluctance of courts[***29] to become engaged in second-guessing an academic institution's decision to deny tenure).

In the case sub judice, the University of Baltimore follows the University of Maryland System's Board of Regents' policy on appointment, rank, and tenure. The trial judge determined, as a matter of law, that the tenure policies of the University of Maryland System, the University of Baltimore, and Merrick were incorporated into Dr. Iz's employment contract. That determination has not been challenged on appeal by either party. Accordingly, we shall briefly set forth the relevant portions of each of those tenure policies.

The tenure and promotion policy of the University of Maryland System states, in pertinent part:

1. The criteria for tenure and promotion in the University of Maryland System are: (1) teaching effectiveness, including student advising; (2) research, scholarship, and, in appropriate areas, creative activities; and (3) relevant service to the community, profession, and institution. The relative weight of these criteria will be determined by the mission of the institution.

[*157] 2. Every institution shall have written procedures governing the promotion and tenure process. [***30]
Following review for form and legal sufficiency by the Office of the Attorney General, these procedures must be submitted to the Chancellor for review and approval. These procedures shall include, at a minimum, the following:

Criteria: A statement of criteria upon which reviews will be based, and guidelines for appointment or promotion to each academic rank, with recognition that institutional mission is the primary factor that defines these criteria.

Procedures: A description of tenure and/or promotion review procedures, including participants, documentation, degree of confidentiality, schedule of the annual cycle for reviews, and authority for final approval.

Appeals: A statement of the right of faculty to appeal promotion and tenure decisions, the grounds for such appeals, and a description of appeal procedures.

The University of Baltimore has three distinct promotion and tenure policies, one each for Merrick, the college of liberal arts, and the school of law. Each of these tenure and promotion policies is attached to the University of Baltimore's Promotion and Tenure Policies and Procedures (the "University's policy"). Although each school has its own tenure and[***31] promotion policy, the University's policy provides for a single appeals procedure that is applicable to each of its schools. It states, in pertinent part:

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

When a faculty member is under review for tenure or promotion, the provost shall consider all prior recommendations, including the dean's recommendation and all reports and recommendations on which the dean's recommendation has been based. After arriving at his/her own recommendation, the provost shall forward this recommendation to the president, together with all materials on which it was based, and [**1119] shall provide the candidate with a copy of the recommendation.

[*158] If the provost's recommendation is negative, the candidate shall have ten calendar days within which to appeal that recommendation by requesting the president to convene the University Faculty Appeals Committee. . . .

* * * *

Grounds for appeal shall be:

1. any error or default in procedure, when such error or default has had a prejudicial effect on the fair consideration of the candidate's case for tenure or promotion;
2. any failure to give adequate consideration either to the candidate's qualifications or to the relevant criteria for tenure, [***32] when such failure has had a prejudicial effect on the fair consideration of the candidate's case for tenure or promotion;
3. a recommendation that is arbitrary, capricious, or not supported by factual data;
4. a recommendation significantly based on any consideration which violates academic freedom or which involves discrimination on the basis of race, gender, religion, national origin, age, physical handicap, marital status, or sexual or affectional preference;
5. a recommendation which violates an explicit written understanding concerning the criteria for tenure or promotion applicable to the candidate.

In no case shall the University Faculty Appeals Committee substitute its judgment on the merits for the judgment of any divisional promotion and tenure committee.

Merrick's Policies and Procedures for Promotion and Tenure provide, in pertinent part:

Preamble: . . . The ideal faculty member is terminally qualified in his/her area of teaching, is an effective teacher at both the graduate and the undergraduate levels, is engaged in scholarly activities of research and publication appropriate to the maintenance and enhancement of scholastic qualifications in [***33]his/her field, has professional ties to [*159] current business practice, and finally, discharges his/her obligations as a faculty member through responsible service on university committees or other such assignments.

* * * *

IV. Criteria and Procedures for Tenure

* * * *

A. Criteria: While a recommendation for tenure signifies favorable recognition of a faculty member's past accomplishments, it should be more importantly an expression of confidence in a candidate's future contribution to his profession, his department, the School of Business, the university and the community. A forecast of future performance must be based on an evaluation of past performance in the required areas of competence as explained below. It must always be remembered that the granting of tenure is the most important decision made about a faculty member, since it is upon the tenured faculty that the future of the School of Business depends.

Specific factors to be considered in the evaluation of the candidate are:

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

1. Educational Preparation
2. Teaching Competency
3. Professional and Scholarly Activity
4. University, Professional, and Community[***34] Service

Merrick's policy then refers back to the qualifications necessary for the ranks of Professor, Associate Professor, Assistant Professor, and Instructor. Here, as we noted, Dr. Iz sought tenure and promotion to the rank of Associate Professor. The qualifications for Associate Professor are, in pertinent part:

1. Educational Preparation - the earned doctorate in an appropriate discipline
2. Teaching

[*160] [**1120] (a) seven years of full-time college teaching experience

(b) excellence in instruction, as indicated by an examination of all relevant sources of information, including input from students, peers, and administrators.

* * * *

3. Professional and Scholarly Activity - evidence of continued interest, involvement, and productivity in the area of specialization

4. University, Professional and Community Service

(a) contributions to the university through faculty or administrative committee service, acceptance and fulfillment of special assignments from faculty organizations or the administration, and services rendered to student organizations as advisor or participant in programs.

(b) contributions[***35] to the broader community through the participation in and/or provision of services to local, regional, and national professional organizations

(Emphasis added).

Similarly, the criteria for promotion provide:

Criteria - To be considered for promotion to any rank, the candidate must possess as a minimum the qualifications listed for that rank It should be noted that possession of the minimum qualifications for a rank does not guarantee promotion to that rank.

(Emphasis added).

Nowhere in the above-quoted passages does it state that research, teaching, and service comprise an exclusive list of criteria by which to evaluate a candidate for tenure and promotion. In addition, as we noted earlier, the University [*161] of Maryland System's tenure policy provides: [HN3] "Final authority for the appointment, promotion, and granting of tenure of faculty resides in the chief executive officer of the institution." Such authority is also provided by statute. See Educ. § 12-109(e)(4) (stating that the respective presidents of the University of Maryland System's constituent institutions "shall . . . appoint, promote, fix salaries, grant tenure, assign duties, and [***36]terminate personnel"). In this case, such authority rests with President Turner.

III.

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

We have set forth at length the provisions of the relevant tenure and promotion policies as a framework to consider appellant's claim that it did not breach the contract, and its argument that "collegiality" is inherently a part of the contract and thus an appropriate consideration in the promotion and tenure review process. We have not found any Maryland cases that directly address the precise issues presented here. This may explain why the trial court concluded that the issue regarding collegiality was a question for the jury to resolve. Nevertheless, we are persuaded by our review of contract principles and cases from other jurisdictions that the University did not breach appellant's contract when it considered Dr. Iz's collegiality. In our view, [HN4] collegiality was a legitimate factor for consideration in the promotion and tenure review process.

We turn to examine the question of whether, in a breach of contract action, collegiality is an appropriate consideration for tenure and promotion, when, as here, it is not specifically listed as a criterion in the contract or policy provisions incorporated[***37] in the contract. n5 [HN5] The interpretation of a contract is, in the first instance, a question of law. *Shapiro v. Massengill*, 105 Md. App. 743, 754, 661 A.2d 202, cert. [*162] denied, 341 Md. 28, 668 A.2d 36 (1995). If the contract is clear and unambiguous, there is no room for construction; [*1121] we must presume the parties intended what they said in the express terms of the agreement. *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 109 Md. App. 217, 291, 674 A.2d 106 (1996), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997); *Shapiro*, 105 Md. App. at 754; see also *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261, 492 A.2d 1306 (1985); *Board of Trustees v. Sherman*, 280 Md. 373, 380, 373 A.2d 626 (1977).

-----Footnotes-----

n5 Prior to trial, appellant and the Officers moved for summary judgment. In denying the motion, the trial court (*Heller, J.*) acknowledged that collegiality is a valid consideration in tenure review, so long as it does not serve as a mask for discrimination. The trial court denied appellant's motion on the ground that a factual dispute existed as to whether collegiality was used in this case as a pretext for discrimination. The court did not address the precise contract issues that we consider here, however. Instead, the trial court stated: "Because the State contract claims rest in good part on the outcome of the sex discrimination issues, summary judgment will be denied on [the contract claims] as well."

-----End Footnotes-----

[***38]

On the other hand, when the contract language is ambiguous, the meaning of the contract is a question to be determined by the trier of fact. *Shapiro*, 105 Md. App. at 754-55. In deciding whether the contract is ambiguous, the court may not resort to extrinsic evidence if it will alter the plain meaning of the writing. *Admiral Builders Sav. & Loan Ass'n v. South River Landing, Inc.*, 66 Md. App. 124, 129, 502 A.2d 1096 (1986). Instead, the court is confined to a review of the contract language itself; it must consider what a reasonable person in the position of the parties would have thought it to mean. See *McIntyre v. Guild, Inc.*, 105 Md. App. 332, 355, 659 A.2d 398 (1995). We will not reverse the trial court's threshold determination that a contract is ambiguous unless the court's decision is clearly erroneous. See Md. Rule 8-131(c); *Shapiro*, 105 Md. App. at 755; *Admiral Builders*, 66 Md. App. at 128- 29.

[HN6] "Collegiality" has been defined as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." Mayberry, 663 F.2d at 514. It is also defined as "the relationship of[***39] colleagues." Merriam Webster's Collegiate Dictionary 225 (10th ed. 1997). When asked to define the term, President Turner testified:

Collegiality is kind of a catch word. When you look it up in the dictionary, you'll find it's hard to find. I'm not even sure it's -- I looked it up and all it talks about is college. It doesn't talk about collegiality or collegial, but I think it, it--the [*163] only times it does it's not in regards to universities. I think it's in regards to, at least the dictionary I looked at -- but it's not a big thing in my decision, but the ability to work with your department to make sure that the University's going to move ahead, that your best interests -- your interests are in the best interest of the University of Baltimore, you betcha.

See *Stein v. Kent State Univ. Bd. of Trustees*, 994 F. Supp. 898, 909 (N.D. Ohio 1998) (equating collegiality with the "ability to get along with co-workers").

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Turning to tenure cases that have been decided elsewhere, we are guided by *Bresnick v. Manhattanville College*, 864 F. Supp. 327 (S.D.N.Y. 1994). There, a dance-and-theater instructor who was denied tenure filed an action for breach of contract and breach[***40] of the duty of good faith and fair dealing. The express categories to be considered for tenure evaluation included: "teaching, scholarly research, professional development, and service to the College, making 'excellence in teaching of first importance.'" Id. at 328. Tenure decisions were to be made by the president, upon recommendation of the Department, the Committee on Faculty Status, and the appropriate administrative officer. The Committee voted 4 to 1 in favor of tenure, but the majority indicated that it was "concerned with [the instructor's] lack of interdisciplinary dance/theater productions" Id. The provost stated that the faculty member had difficulty working with colleagues, and the president "expressed concern about [the faculty member's] unwillingness to work with colleagues 'in a sufficiently collegial and collaborative manner,' raising 'doubts about his ability to offer the necessary leadership" Id. The court granted summary judgment in favor of the college, stating:

Cooperation and collegiality are essential to a department which may be called upon to work with other departments, and to train students to collaborate in the difficult[***41] task of orchestrating dance or drama programs in the outside world. Where what is mentioned is clearly within a relevant category, it would be blind in the extreme to require the category to be specified in haec verba.

[*164] [*1122] Courts . . . are reluctant to intrude into decisions of this type, because doing so would substitute judicial evaluation of teaching effectiveness for the judgment of those charged with that function by the institution.

. . . Stress on overly detailed written criteria can act as a straitjacket preventing consideration of sometimes critical but more subjective factors. Courts accordingly decline to impose either regime on an institution, or distort language used to force an institution into a more paperwork-based mode.

Id. at 328 (citations omitted).

McGill v. Regents of the University of California, 44 Cal. App. 4th 1776, 52 Cal. Rptr. 2d 466 (Ct. App. 1996), is also illuminating. There, the university's tenure criteria included "teaching, research and other creative work, professional activity, and University and public service." 52 Cal. Rptr. 2d at 472. The faculty member challenged the denial of tenure, asserting that the decision was based solely on his[***42] lack of collegiality, which was not one of the listed criteria. The trial court concluded that the denial was based on the faculty member's lack of "congeniality," and granted a writ of mandamus, requiring the chancellor of the university to set aside the denial of tenure. But the appellate court reversed, concluding that collegiality was an acceptable consideration in tenure review and that the record revealed that collegiality was but one consideration in denying tenure in that case. What the court said is particularly pertinent here: [HN7] "Although not expressly listed as one of the tenure criteria, it is inescapable that collegiality is an appropriate consideration." Id.

Moreover, the court noted that the "American Association of University Professors' Statement on Professional Ethics contemplates as much." Id. That Statement provided:

"As a colleague, the professor has obligations that derive from common membership in the community of scholars; respects and defends the free inquiry of associates; in the exchange of criticism and ideas, shows due respect for the opinions of others; acknowledges academic debts and [*165] strives to be objective in professional judgment of colleagues; [***43] and accepts a share of faculty responsibilities for the governance of the institution."

52 Cal. Rptr. 2d at 470 n.3 (quoting American Association of University Professors, Statement on Professional Ethics (1987)); see also *Levi v. University of Texas*, 840 F.2d 277, 282 (5th Cir. 1988) ("We must recognize . . . that the future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty."); *Mayberry*, 663 F.2d at 514; *Mabey v. Reagan*, 537 F.2d 1036, 1044 (9th Cir. 1976) ("An essential element of the probationary process is periodic assessment of the teacher's performance, including the person's ability and willingness to work effectively with his colleagues."); *Schalow v. Loyola Univ.*, 646 So. 2d 502, 505 (La. Ct. App. 1994) (holding that faculty handbook's provision that spoke of "evaluating the suitability of the faculty member as a professional colleague" was "certainly broad enough to include collegiality"); see generally

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Perry A. Zirkel, *Personality As a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 Clev. St. L. Rev. 223, 226 n.17 (1984-85) ("Personality[***44] factors [or collegiality] are, of course, part of teaching and service.").

We are persuaded that collegiality is a valid consideration for tenure review. Although not expressly listed among the School's tenure criteria, it is impliedly embodied within the criteria that are specified. Without question, collegiality plays an essential role in the categories of both teaching and service. With respect to teaching, collegiality is certainly an important factor pertaining to "excellence in instruction, as indicated by an examination of all relevant sources of information, including input from students, peers, and administrators." With regard to service--particularly, internal service--collegiality is fairly included within the criterion that includes "contributions to the university through faculty or administrative committee service, acceptance and fulfillment of special assignments from faculty organizations or the administration." Therefore, we [**1123] conclude that the trial court erred in failing to hold, as a [*166] matter of law, that collegiality was an appropriate consideration in the context of Dr. Iz's review for tenure and promotion.

We acknowledge, however, that [HN8] collegiality may not be[***45] used as a pretext for discrimination. See Stein, 994 F. Supp. at 909 ("The ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions."). Indeed, "tenure decisions are not exempt under Title VII . . ." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984); see also *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc), cert. denied, U.S. , 139 L. Ed. 2d 752, 118 S. Ct. 851 (1998); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153-54 (2d Cir.), cert. denied, 439 U.S. 984, 58 L. Ed. 2d 656, 99 S. Ct. 576 (1978). In this case, however, Dr. Iz's claims of discrimination were rejected by the jury. Having failed to prove that the denial of tenure was based upon discrimination, we hold that Dr. Iz's contract claims must also fail. See *Mayberry*, 663 F.2d at 520 n.43 (holding that, in denial of tenure case, appellant's pendent state claim alleging breach of contract failed, because it "amounted to no more than a reassertion, in a different guise, of the First Amendment invasion claims").

IV.

Even if collegiality were not a proper consideration for tenure, Dr. Iz's claim must fail. Neither[***46] the contract at issue nor the policy provisions incorporated therein provides that Dr. Iz will be awarded tenure or promotion so long as the recommendations are outstanding. Indeed, Merrick's policy expressly stated in its criteria for promotion that "possession of the minimum qualifications for a rank does not guarantee promotion to that rank." To be sure, Dr. Iz was entitled to a fair process, and she could not be denied promotion of tenure based on an illegal reason. Nevertheless, subject to the proper procedures, the ultimate authority to award tenure and [*167] promotion by policy and by State law, rests with President Turner. Educ. § 12-109(e)(4).

The contract in this case, as amended by the parties, stated:

Dr. Iz's year of tenure review will be [academic year] 1994. If successful, tenure will become effective immediately. Dr. Iz will be given one (1) year credit toward her tenure review.

The contract also contained the following provision:

General Conditions Governing Academic Freedom and Tenure.

The FACULTY MEMBER will enjoy the rights and be subject to the provisions of the Board of Regents' Appointment, Rank, and Tenure Policy as the same may be amended[***47] from time to time. A current copy of this policy has been furnished to the FACULTY MEMBER along with the contract and has been read by him prior to his affixing his signature thereto.

Thus, the contract unambiguously stated that Dr. Iz would be entitled to tenure review in academic year 1994, subject to the provisions of the Board of Regents' Appointment, Rank, and Tenure Policy. Clearly, the contract did not guarantee an award of tenure. Rather, it provided that, "[i]f successful," Dr. Iz would be awarded tenure. Dr. Iz received the review to which she was contractually entitled.

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

As we indicated, [HN9] a faculty member who has satisfactory qualifications in every category is not necessarily assured the award of tenure. See *Kumar v. Board of Trustees*, 774 F.2d 1, 11 (1st Cir. 1985) ("In the selection of a professor, judge, lawyer, doctor, or Indian chief, while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities."), cert. denied, 475 U.S. 1097, 89 L. Ed. 2d 896, 106 S. Ct. 1496 (1986). The case law that we reviewed earlier makes it abundantly clear that colleges and universities typically[***48] enjoy wide discretion because of the varied considerations that affect [*168]the tenure decision, regardless of the merit of the individual candidate.

Here, President Turner had the ultimate authority to award or deny tenure to Dr. Iz. It is noteworthy, in this regard, that [**1124] the appeals process, as described in the University's policy, expressly states that it applies in the event that the provost gives a negative recommendation, but it is silent as to the president's decision. Indeed, there is nothing to indicate that the lower levels of review are binding upon the president. To the contrary, they are merely recommendations, and are therefore advisory in nature. See *Ritter*, 114 Md. App. at 97 ("The prevailing rule is that, [HN10] when a tenure process is established in writing and is communicated to a prospective appointee, a subordinate official may not circumvent that process and bind the college to a tenure arrangement."); *Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987) (holding board of regents, which held ultimate decisional authority on whether to grant tenure, did not violate faculty member's right to procedural due process when it rejected faculty committee's recommendation[***49] to award tenure); *Erickson*, 585 F. Supp. at 212 (entering judgment as a matter of law in favor of law school on faculty member's breach of contract claim because, inter alia, the faculty committee's role in tenure process was merely advisory); *Amoss v. University of Washington*, 40 Wash. App. 666, 700 P.2d 350 (Wash. Ct. App. 1985) (limiting its review to the board of regents and the president, because they were vested with final authority in tenure decisions); cf. *Lemlich v. Board of Trustees*, 282 Md. 495, 501, 385 A.2d 1185 (1978) (holding that faculty member's resignation could not be accepted by college president because sole authority to accept resignations resided in board of trustees); see also *Board of Trustees v. Fineran*, 75 Md. App. 289, 305, 541 A.2d 170 (1988); but see *Haimowitz v. University of Nevada*, 579 F.2d 526, 530 (9th Cir. 1978) ("The recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision.").

[*169] An academic institution is not precluded from deciding, for example, that it does not want to assume certain financial commitments because of a concern regarding[***50] declining revenues or shrinking enrollment. Such decisions at the University of Baltimore are entirely within the discretion of President Turner. Unless he exercised his discretion in bad faith, or his reason for denying tenure constituted a pretext for unlawful discrimination, Dr. Iz's breach of contract claim cannot lie.

V.

In addition to her argument that the University improperly considered collegiality, Dr. Iz asserted that the University breached its contract because she was held to a higher standard as a result of undergoing tenure review one year early. The trial court instructed the jury that it "must . . . find for [Dr. Iz] on the breach of contract claim if [it found] that the tenure application was judged by a higher standard because it was early and that the tenure and promotion policies do not provide that the standards to be applied are higher if the tenure application is early."

As evidence of her being held to a higher standard, Dr. Iz points to (1) memoranda from her IQS colleagues and Dean Costello recommending that she not undergo early tenure review; (2) Provost Legon's memorandum granting Dr. Iz's request to seek early review, but advising her[***51] that, if promotion and tenure were denied, she would receive a terminal contract; (3) Dean Costello's memorandum recommending against awarding tenure, in which he noted that Dr. Iz applied for early tenure against the strong recommendation of her tenured IQS colleagues; (4) Provost Legon's memorandum to President Turner noting that Dr. Iz and the School of Business "might have benefitted from an additional year to develop and review this case"; (5) the majority opinion of the FAC, which concluded that her application for early tenure was among the factors that "created a hostile climate" in the Department and "precluded her receiving a fair review based on the merit of her academic achievements"; (6) the opinion of FAC member Chuck Rees who concluded that, because Dr. Iz [*170] sought early review, it appeared that she was held to a higher standard which "seems inconsistent with the published standards"; (7) the testimony of President Turner, who stated that, in order to obtain tenure early, Dr. Iz should have obtained "broad support" from the Department, the dean, and the provost; (8) President's Turner's testimony [**1125] that a person seeking early tenure should be "an extraordinary and exceptional[***52] person," and that Dr. Iz was not; (8) President Turner's testimony that Dr. Iz was required to be

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

excellent or outstanding in all three of the stated tenure criteria; and (9) President Turner's past awards of tenure to faculty members whose recommendations were not as high as those received by Dr. Iz.

Dr. Iz's claim that President Turner held her to a higher standard centered on his statements that, to merit tenure, Dr. Iz would have to be extraordinary or exceptional. President Turner explained that such a standard required Dr. Iz to meet the same standard that she would have faced had she waited another year to undergo tenure review. Holding Dr. Iz to the same standard that she would face one year later, when she was scheduled to undergo tenure review, does not constitute a breach of contract.

To support Dr. Iz's argument that she was held to a higher standard, she also relied on President Turner's past decisions to award tenure to faculty members who had not been as highly recommended for tenure as was Dr. Iz. We are unpersuaded by appellee's argument. We do not believe that, in the exercise of discretion, President Turner was obligated to award tenure to Dr. Iz merely because[***53] he had done so in regard to other candidates, even if those recommendations had been less favorable than the ones Dr. Iz received.

Ordinarily, an employer may terminate an at-will employee at any time, for almost any, or no, reason at all. *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 490, 665 A.2d 297 (1995), cert. denied, 341 Md. 172, 669 A.2d 1360 (1996); *Lee v. Denro, Inc.*, 91 Md. App. 822, 829, 605 A.2d 1017 (1992); *Beery v. Maryland Med. Lab., Inc.*, 89 Md. App. 81, 94, [*171] 597 A.2d 516 (1991), cert. denied, 325 Md. 329, 600 A.2d 850 (1992); *Haselrig v. Public Storage, Inc.*, 86 Md. App. 116, 122, 585 A.2d 294 (1991). There is an exception, however, when the at-will employment relationship is modified by the provisions of an employee handbook or the provisions of a personnel policy. *Bagwell*, 106 Md. App. at 490; *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md. App. 381, 392, 486 A.2d 798, cert. denied, 303 Md. 295, 493 A.2d 349 (1985). It is undisputed that Dr. Iz was not an at-will employee. Instead, she was entitled to tenure review, in accordance with her contract and the School's promotion and tenure policies.

As we stated in [***54] *Staggs*, [HN11] policy provisions that limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee.

61 Md. App. at 392; see also *Bagwell*, 106 Md. App. at 492. Nevertheless, not all personnel policies contained in employee manuals create enforceable contractual rights. We explained in *Staggs*:

Not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant. . . . "General statements of policy are no more than that and do not meet the contractual requirements of an offer."

Staggs, 61 Md. App. at 392 (quoting *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626 (Minn. 1983)); see also *Bagwell*, 106 Md. App. at 493. Although both *Staggs* and *Bagwell* concerned termination of employees, we consider their principles equally applicable to cases involving a decision not to promote an employee.

MacGill v. Blue Cross of Maryland, Inc., 77 Md. App. 613, 551 A.2d 501, [***55] cert. denied, 315 Md. 692, 556 A.2d 673 (1989), is also instructive. It inexorably leads us to conclude that Dr. Iz's allegation that she was held to a higher standard [*172] than other candidates did not state a cause of action for breach of contract.

In *MacGill*, an employee who was denied promotion over other candidates filed a complaint for breach of contract, alleging that the employer violated its personnel policies. The employee asserted, *inter alia*, that he was discriminated against on the basis of age [**1126] or sex; that the employer did not screen the applicants for minimum job qualifications; that the employer did not treat him equally with the successful candidate based on merit, qualifications, ability, and experience; and that the employer's decision to hire other candidates was not properly supported. 77 Md. App. at 616. We observed that the "critical element" of the appellant's complaint was his allegation, "based upon his perception, that he was the most qualified applicant for each of the vacant positions and yet was not hired to fill them." *Id.* at 619. In affirming the trial court's grant of summary judgment in favor of the employer, we concluded that the employer's[***56] policies were merely "general statements of policy," which did not rise to the level of "contractual requirements for an offer." *Id.* at 620 (internal quotations omitted). Thus, we determined that appellant's allegation was insufficient to generate a genuine dispute of material fact for resolution by a jury. We stated:

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Were such allegations accepted as sufficient, the courts would necessarily become involved in the assessment of the propriety and soundness of a company's personnel decisions; the courts would be required to act as super personnel officers, overseeing and second-guessing the company's decisions whenever an unsuccessful applicant perceives him--or herself to have been the most qualified applicant.

77 Md. App. at 620 n.3.

We also said:

Personnel policies that specifically prescribe and limit the procedures that an employer must use in filling vacant positions, but do not prescribe with whom they are to be filled, do not rise to the level of contractual undertakings. [*173] And they are not elevated to that status by allegations that one of the applicants is more qualified than the other applicants.

Id. at 620.

To be sure, the decision whether to award tenure[***57] or promotion did not involve a vacant position. But the tenure and promotion policies in this case "do not prescribe with whom [vacant positions] are to be filled." Unlike the case in MacGill, in which others were selected over the appellant to fill vacancies, there was no "vacancy" at issue in the case sub judice. President Turner was not choosing among several candidates for one position. Instead, he was deciding whether to promote Dr. Iz alone. Thus, if the appellant in MacGill could not state a cause of action on the ground that he had been better qualified than others for one position, certainly Dr. Iz did not state a cause of action on the ground that she had been better qualified than others who had been promoted and awarded tenure in the past.

Dr. Iz elected to seek tenure one year early. As a result, the Department, dean, provost, and president were deprived of an entire academic year in which they could observe and evaluate Dr. Iz in the academic environment. In light of the subjective nature of the tenure evaluation process, President Turner's requirement that Dr. Iz be extraordinary or exceptional to merit tenure one year early does not constitute a breach[***58] of contract. By deciding to undergo early review, Dr. Iz was, in essence, proclaiming that she was, indeed, extraordinary or exceptional compared to the typical faculty member who would normally pursue tenure review one year later.

As we have explained, the tenure process is inherently subjective and discretionary in nature. Even if a particular professor is universally well regarded at the institution, and satisfies every criterion for tenure, the professor is not necessarily entitled to tenure. We do not believe that a faculty member has stated a cause of action for breach of contract merely because, in the exercise of discretion, the president has [*174] awarded tenure to one candidate who was not as highly regarded as another. To authorize a breach of contract action under such circumstances would, in essence, bind the President to awarding tenure based upon past recommendations.

VI.

The jury concluded, as we noted earlier, that there was no discrimination by Dean Costello, Provost Legon, or President Turner. [**1127] We must next consider whether President Turner acted in bad faith.

Appellant contends that the trial court erred in denying the motion for judgment as a matter of law because[***59] there was no evidence of breach of the covenant of good faith and fair dealing. n6 In essence, appellant argues that the covenant was not breached because the University followed its policies and procedures when it reviewed Dr. Iz for tenure.

-----Footnotes-----

n6 Appellant also contends that the implied covenant of good faith and fair dealing was not part of Dr. Iz's contract because sovereign immunity precludes the breach of contract claim. We need not decide that issue here.

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

-----End Footnotes-----

As we observed earlier, the trial court instructed the jury regarding the covenant of good faith and fair dealing, stating:

I instruct you that there exists an implied covenant of good faith and fair dealing in the contract between [Dr. Iz] and her employer, the Defendant University. That covenant required [Dr. Iz] and the University to act in good faith towards and deal fairly with each other in regard to their employment relationship.

In this case, [Dr. Iz] claims that the University willfully breached the covenant of good faith and fair dealing[***60] by knowingly denying her tenure and promotion on the basis of an unfair discriminatory evaluation process. Your verdict must be for [Dr. Iz] and against the University on her claim for breach of covenant of good faith and fair dealing if you find that the University of Baltimore unreasonably denied [Dr. Iz] her promotion and tenure and did so in bad faith.

[*175] If you find that the University acted reasonably in evaluating and denying [Dr. Iz] tenure and a promotion, then your verdict must be for the University on [Dr. Iz's] claim of breach of covenant of good faith and fair dealing.

Appellant argues that "there is absolutely no evidence that [President] Turner acted unreasonably or in bad faith when he decided to deny tenure to Dr. Iz." Appellant also insists that, because the ultimate authority to award tenure rests with President Turner, even if others involved in the tenure review process demonstrated bad faith, it cannot be imputed to President Turner.

[HN12] "If an employer has contracted to do something that requires it to exercise its discretion, then it must exercise that discretion in good faith." *Elliott v. Board of Trustees*, 104 Md. App. 93, 108, 655 A.2d 46, cert. [***61] denied, 339 Md. 354, 663 A.2d 72 (1995). *Elliott*, although not directly on point, is instructive. There, the college terminated a nontenured employee for leaving his shift early without his supervisor's permission. Appellant contended that he had his supervisor's permission. The employer had a grievance policy that was contained in a policy manual. Relying on *H & R Block, Inc. v. Garland*, 278 Md. 91, 99-100, 359 A.2d 130 (1976), and *MacGill*, 77 Md. App. at 619-20, we concluded that, "absent evidence of bad faith on the part of an employer, courts should be reluctant to overturn an employer's decision to discharge an employee when the employer has complied with its own procedures for resolving matters such as this." *Elliott*, 104 Md. App. at 108-09. Further, we observed:

"An employer may limit his right to terminate a worker by establishing virtually any disciplinary procedure. But courts must not read more into the procedure than is there. Unless some public policy is implicated, employee grievance mechanisms should be analyzed only for what they offer; they must not be seen automatically as quasi-judicial forums for final and impartial dispute resolution governed[***62] by standards of due process and neutral fairness."

[*176] *Id.* at 110 (quoting *Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 310, 596 A.2d 1069 (1991)). Because we found that there was no evidence or proffer of bad faith on the part of the employer, we held that there was no breach of the covenant of good faith. 104 Md. App. at 112.

Close on point is *Baker*, 504 A.2d at 247. In that case, a college professor filed actions for breach of contract and defamation after he was denied reappointment. The defamation [**1128] claims involved critical evaluations of the appellant's teaching ability, grading procedures, his willingness to contribute to the department, and his relationships with other faculty members. *Id.* at 248. After affirming dismissal of the defamation claims, the court addressed the breach of contract count. It said: "The College's obligation to act in good faith extends only to the performance of those contractual duties it has chosen to assume." *Id.* at 256. Nevertheless, the court recognized that once "the College undertook to evaluate Baker, the evaluation and review process must be honest and meaningful, not a sham formality designed to ratify an arbitrary decision[***63] already made." *Id.* at 255. In rejecting the appellant's claim, the court reasoned:

Baker had an ample opportunity to present his side of the story to all those involved in the review process, and the record is devoid of any evidence of bias, arbitrariness, misrepresentation or any other sharp practice on the part of the College.

123 Md. App. 135, *, 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

Under the guise of "good faith," Baker would have us conduct a de novo review of the College's decision not to renew his contract. We decline Baker's invitation to reexamine the merits of the College's decision or to apply some sort of negligence standard to the myriad of "sub-decisions" involved, such as how much weight to give certain facts or how much investigation into a particular allegation was warranted, because we hold that the only reasonable construction of the contract between the parties is that at all times the College retained its sole discretion to decide whether to reappoint Baker. The Faculty Handbook states [*177] that "to merit consideration for reappointment, an Assistant Professor must have a record of good teaching, professional growth, and service to the College." In other words, even if Baker had received the most favorable evaluation[***64] possible, he would not be contractually entitled to reappointment; he would simply "merit consideration." The College still retained the freedom not to rehire him; Baker had no contractual right to reappointment under any circumstances. Therefore, upon finding, as we have, that the College performed all its contractual obligations fully and in good faith, the terms of the contract require that our inquiry end.

Id. (alteration in original) (footnote omitted); see also Henry, 1998 WL 15897, No. CIV.A. 8837 (Del. Ch. Jan. 12, 1998) (relying on Baker and granting summary judgment in favor of law school on breach of contract and libel actions brought by faculty member who had been denied tenure).

Like the faculty handbook provision in Baker, both the University's policy and the Criteria and Procedures for Tenure contained in Merrick's Policies and Procedures for Promotion and Tenure, speak of a "recommendation" for tenure. Dr. Iz was entitled to tenure review according to Merrick's policies and procedures, which would ultimately lead to a recommendation to President Turner that he either award or deny tenure to Dr. Iz. Nevertheless, even if Dr. Iz had received[***65] favorable reviews at all levels of the process, Dr. Turner was not obligated to award tenure.

It cannot be disputed that Dr. Iz took full advantage of the review and appeals procedures. There is no evidence that the process was merely a sham to ratify an arbitrary decision that President Turner had already made. Indeed, as we already noted, when President Turner received the FAC's recommendation on May 2, 1994, he met with several people involved in reviewing Dr. Iz's application for promotion and tenure: he asked for information about student evaluations; he met with Dr. Iz's female colleagues in the IQS Department to determine if they experienced discrimination; he asked the [*178] chairperson of the T and P Committee if the process had been fair to Dr. Iz; and he met with many members of the FAC to investigate Dr. Iz's claim of inappropriate remarks being made to her. Moreover, when informed of Dr. Iz's allegations concerning inappropriate remarks, President Turner independently investigated those claims and actually confronted those who had been accused of making the statements. He concluded that they had not been made. President Turner's actions unequivocally [**1129]demonstrate that he did[***66] not act in bad faith. To the contrary, the evidence established that he acted in good faith.

Conclusion

The cases are legion that it is not the function of the courts to second-guess judgment calls made by those vested with the ultimate authority and responsibility to decide whether to award tenure. In this case, it was the president's duty to make decisions as to promotion and tenure in the best interest of the institution.

What the Pennsylvania Supreme Court stated in affirming the intermediate appellate court in Baker is equally apt here:

As in all aspects of life, no procedure is fool proof. In our judicial system we have various appeals to review lower court determinations alleged to be improper or unwise. The purpose of appellate review is to correct any prior wrongdoings. Likewise, The Faculty Handbook sets forth review procedures. In accordance with these procedures, the Appellant appealed to the president of the College and ultimately to the board of trustees. We would be hard-pressed to conclude that the College acted in bad faith when it followed the required review procedures. [HN13] This Court has no jurisdiction to review the factual determinations of a college's[***67] governing body unless it can be clearly demonstrated that that body violated its procedures.

Baker v. Lafayette College, 516 Pa. 291, 532 A.2d 399, 403 (Pa. 1987); see Pomona College v. Superior Court, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662, 668 (Ct. App. 1996) ("Absent discrimination, judicial review of tenure decisions in California is limited to [*179] evaluating the fairness of the administrative hearing in an administrative mandamus action."); Claggett v. Wake Forest Univ., 126 N.C. App. 602, 486 S.E.2d 443 (N.C. Ct. App. 1997) (holding no breach

123 Md. App. 135, *; 716 A.2d 1107, **;
1998 Md. App. LEXIS 158, ***; 136 Lab. Cas. (CCH) P58,492

of contract would lie for denial of tenure when the university's policies were construed to permit consideration of factors other than the expressly listed criteria and school followed its procedures); see also *Marriott v. Cole*, 115 Md. App. 493, 510, 694 A.2d 123 (considering the due process claim of a faculty member who was denied tenure and terminated and stating that she was only entitled to the procedure for consideration of tenure set forth in the policy that was included in her contract), cert. denied, 347 Md. 254, 700 A.2d 1215 (1997).

We conclude that there was insufficient evidence that the University [***68]breached its contract or otherwise breached the covenant of good faith and fair dealing when it denied tenure and promotion to Dr. Iz. Upon the jury's determination that Dr. Iz was not the victim of unlawful discrimination, and because there was also insufficient evidence that the University failed to follow its tenure review procedures, we hold that judgment should have been entered for appellant.

APPELLANT'S MOTION TO DISMISS AND MOTION TO STRIKE ARE HEREBY DENIED;

JUDGMENT REVERSED;

COSTS TO BE PAID BY APPELLEE.

BARBARA VON GUNTEN, Plaintiff-Appellant, v. STATE OF MARYLAND, MARYLAND DEPARTMENT OF THE ENVIRONMENT, Defendant-Appellee. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.
No. 00-1058

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

243 F.3d 858; 2001 U.S. App. LEXIS 4129; 85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

January 22, 2001, Argued
March 20, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-98-3883-H).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff filed an action alleging sexual harassment, constructive discharge, and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. The United States District Court for the District of Maryland at Baltimore granted summary judgment for defendant. Plaintiff appealed the order granting defendant summary judgment on her retaliation claim.

OVERVIEW: Plaintiff employee was employed by defendant agency. Sexually inappropriate comments and actions were directed to plaintiff by a male co-worker while they were working. According to plaintiff, the co-worker would touch his crotch area frequently, groan and engage in actual or suggestive self stimulation. On review of summary judgment, plaintiff argued that various actions of defendant constituted an adverse employment action under Title VII. The circuit court found that (1) none of the alleged harassment that plaintiff complained about had an adverse effect on the terms, conditions, or benefits of her employment; (2) plaintiff failed to present evidence of conduct severe or pervasive enough to create a hostile work environment; and (3) defendant's conduct in withdrawing plaintiff's use of a state vehicle and reassigning her to shoreline survey work did not constitute an adverse employment action.

OUTCOME: Judgment was affirmed, since none of the actions of defendant were used as a basis to detrimentally alter the terms or conditions of plaintiff's employment, and none of them constituted an adverse employment action.

CORE TERMS: von, retaliation, harassment, retaliatory, boat, employment decision, supervisor, rating, protected activity, adversely affected, summary judgment, aide, adversely, shoreline, year-end, anti-retaliation, effected, sexual harassment, unsatisfactory, reassignment, abusive, sick leave, hostile work environment, personnel, license, hiring, reasonable person, additionally, discriminatory, subjected

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law: Discrimination: Title VII
[HN1] See 42 U.S.C.S. § 2000e-3.

Labor & Employment Law: Discrimination: Retaliation
[HN2] In order to establish a prima facie retaliation case under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse

243 F.3d 858, *, 2001 U.S. App. LEXIS 4129, **;
85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

employment action against her; and (3) a causal connection existed between the protected activity and the asserted adverse action. 42 U.S.C.S. § 2000e3(a).

Labor & Employment Law: Discrimination: Retaliation

[HN3] Retaliation claims under § 2000e-3 of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., like discrimination claims under § 2000e-2, require proof of an "adverse employment action."

Labor & Employment Law: Discrimination: Retaliation

[HN4] Conduct short of "ultimate employment decisions" can constitute adverse employment action for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. Of course, "ultimate employment decisions" -- to hire, discharge, refuse to promote, etc. -- can constitute the necessary adverse employment action, but "retaliatory harassment" can also comprise adverse employment action. What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected "the terms, conditions, or benefits" of the plaintiff's employment.

Labor & Employment Law: Discrimination: Retaliation

[HN5] For purposes of an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., adverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the "terms, conditions, or benefits" of employment.

Labor & Employment Law: Discrimination: Retaliation

[HN6] A retaliatory downgrade of a performance evaluation could effect a term, condition, or benefit of employment.

Labor & Employment Law: Discrimination: Title VII

[HN7] Terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from a state agency's disciplinary procedures.

Labor & Employment Law: Discrimination: Retaliation

[HN8] Retaliatory harassment can constitute adverse employment action for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., but only if such harassment adversely affects the terms, conditions, or benefits of employment.

Labor & Employment Law: Discrimination: Sexual Harassment: Hostile Work Environment

[HN9] For a hostile work environment claim to lie there must be evidence of conduct "severe or pervasive enough" to create an environment that a reasonable person would find hostile or abusive. The plaintiff's burden of proof in this regard is twofold: she must show that her workplace was both subjectively and objectively hostile.

COUNSEL: ARGUED: Neil Lawrence Henrichsen, HENRICHSEN SIEGEL, P.L.L.C., Washington, D.C., for Appellant.

Barbara L. Sloan, Office of the General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

Andrew Howard Baida, Assistant Attorney General, Baltimore, Maryland, for Appellee.

ON BRIEF: Joanna R. Onorato, HENRICHSEN SIEGEL, P.L.L.C., Washington, D.C., for Appellant.

C. Gregory Stewart, General Counsel, Philip B. Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Office of the General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

J. Joseph Curran, Jr., Attorney General of Maryland, Norma Jean Kraus Belt, Assistant Attorney General, Stephanie Cobb Williams, Assistant Attorney General, Baltimore, Maryland, for Appellee.

JUDGES: Before WILLIAMS and MOTZ, Circuit Judges, and Claude M. HILTON, Chief United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Motz[**2] wrote the opinion, in which Judge Williams and Chief Judge Hilton joined.

OPINIONBY: DIANA GRIBBON MOTZ

OPINION: [*861]

DIANA GRIBBON MOTZ, Circuit Judge:

The district court granted summary judgment to the employer in this Title VII retaliation action on the ground that the employee offered no evidence that her employer took adverse employment action against her in retaliation for protected activity. Because none of the employer's asserted retaliatory acts adversely affected the terms, conditions, or benefits of her employment, we agree that the employee suffered no adverse employment action. Accordingly, we affirm.

I.

In January 1996, Barbara von Gunten began work as an Environmental Health Aide III (aide) at the Maryland Department of the Environment (MDE). Typically, an aide spends the three winter months conducting shoreline sanitary surveys, in which the aide places tracer dye in the toilets and washing machines of coastal residents and then checks the surrounding areas for leaks in the septic system. During the remaining nine warm-weather months, an aide works on a two-person [*862] boat, collecting water samples from various locations on the Chesapeake Bay.

After von Gunten had been working[**3] as an MDE aide for approximately six weeks, William Beatty, head of the Shellfish Monitoring Section, reviewed von Gunten's job performance. Beatty favorably rated von Gunten, stating, among other things, that von Gunten had shown the "ability to work well with fellow employees" and demonstrated "motivation and cooperation with fellow employees." In June 1996, von Gunten began performing full-time boat work. MDE assigned her to work on a boat with Vernon Burch, who served as von Gunten's field supervisor. Burch was responsible for providing von Gunten with on-the-job training, including instruction on how to operate and maintain the boat. The boat was a small, open sailing vessel that required the two operating employees to work in close proximity to one another. Both von Gunten and Burch reported to Beatty.

Almost immediately after von Gunten began working with Burch problems arose. Burch assertedly urinated from the boat, made crude and sexually suggestive comments toward von Gunten, and stared at and touched various parts of her body against her will. On August 1, 1996, von Gunten contacted Beatty to complain that Burch had sexually harassed her. Beatty, in turn, contacted his[**4] supervisor, John Steinfort. A few days later, Burch, von Gunten, Beatty, and Steinfort met to discuss the problem; the supervisors explained that no employee could sexually harass another and distributed the MDE antiharassment policy. Burch denied that he had done anything improper. According to von Gunten, Burch's conduct did not improve, but rather worsened and she continued to complain to her supervisors about him.

On December 10, 1996, Beatty observed von Gunten and Burch working together and assertedly saw von Gunten screaming and acting in an unprofessional manner. On the next day, December 11, 1996, Burch struck von Gunten across the buttocks with an oar. After that incident, von Gunten telephoned Steinfort at home and asked to be taken off Burch's boat. Von Gunten asserts that Steinfort was unsympathetic to her complaints and demanded that she return to the boat the next morning or be fired. Steinfort maintains that von Gunten's charges against Burch were "unsubstantiated" and "completely out of character with" Burch's twenty-year "work record," and that he determined that Burch had inadvertently touched von Gunten with the end of an oar while testing water depth. Nevertheless, [**5] Steinfort agreed to remove von Gunten from Burch's boat.

The next day, von Gunten informed Steinfort that she was going to contact MDE's Fair Practices Office to discuss her sexual harassment concerns. Later in the day, Steinfort, himself, contacted MDE's Personnel Director and Steven Bieber, an MDE Fair Practices officer; he told both men that he did not believe that there was enough information to substantiate von Gunten's harassment claims. On December 13, 1996, von Gunten sent a letter to the Director of MDE's Fair Practices Office, explaining her situation and requesting his office's assistance. At the Director's request, Bieber

243 F.3d 858, *, 2001 U.S. App. LEXIS 4129, **;
85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

undertook an investigation, after which he concluded that although there was some evidence to support von Gunten's harassment claims, the harassment was not so "severe as to create an abusive working environment."

Von Gunten asserts that, after her December 13 letter to MDE's Fair Practices Office, MDE took a number of actions that constituted impermissible retaliation under Title VII. These include withdrawal of the state car that had been issued to von Gunten since her employment began, forcing her to use her personal car for work travel and request[**6] reimbursement for her mileage expenses; downgrading her year-end evaluation; reassigning her to shoreline survey work; improperly handling various administrative matters; and subjecting her to retaliatory harassment creating a hostile [*863] work environment. On February 28, 1997, von Gunten filed charges with the Equal Employment Opportunity Commission (EEOC), alleging sex discrimination and unlawful retaliation.

In August 1997, MDE presented for von Gunten's consideration a description of a job assignment for a new aide position. The new position would have required her to spend less time on boat work and more time performing shoreline surveys than von Gunten's previous position. Further, the position required that von Gunten spend more time at the field office where she would most likely come in contact with Beatty and Steinfort. Von Gunten rejected the position as unsuitable.

In October 1997, von Gunten met with the officials of MDE's Fair Practices Office to discuss her sexual harassment and retaliation claims. According to von Gunten, they expressed little concern for her situation. On November 12, 1997, von Gunten resigned.

Following receipt of a notice from the EEOC of her right[**7] to sue, on November 25, 1998, von Gunten filed this action, asserting sexual harassment, constructive discharge, and retaliation claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e3(a) et seq. After extensive discovery, MDE moved for summary judgment. The district court granted the motion as to von Gunten's constructive discharge and retaliation claims, but denied the motion as to von Gunten's sexual harassment claim. That claim subsequently was tried before a jury, which returned a verdict against von Gunten. Von Gunten now appeals the order granting MDE summary judgment on her retaliation claim.

Section 704 of Title VII, 42 U.S.C. § 2000e-3 (1994), provides in relevant part that [HN1] "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has made a charge . . . under this subchapter." In this circuit, [HN2] to establish a prima facie § 2000e-3 retaliation case, a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection[**8] existed between the protected activity and the asserted adverse action. See Beall v. Abbott Laboratories, 130 F.3d 614, 619 (4th Cir. 1997). n1

-----Footnotes-----

n1 Although von Gunten acknowledges that this test must be met to state a prima facie § 2000e-3 retaliation case, the EEOC contends that the second prong of the test set forth above is too restrictive. The EEOC maintains that, unlike 42 U.S.C. § 2000e-2 (1994), which prohibits discriminatory employment actions, § 2000e-3 prohibits, not just "adverse employment actions," but also "any retaliatory conduct by an employer that is reasonably likely to deter protected activity." EEOC Brief at 13 and 15 n.1. But this court long ago determined, in a case that we (and others) have cited repeatedly, that [HN3] § 2000e-3 retaliation claims, like § 2000e-2 discrimination claims, require proof of an "adverse employment action." See Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). We explained in Ross that "Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2" and "in the absence of strong contrary policy considerations, conformity between the provisions of Title VII is to be preferred." Id. at 366.

-----End Footnotes-----

[**9]

For summary judgment purposes, MDE concedes that von Gunten has satisfied the first and third prongs of her prima facie case. However, MDE argues, and the district court found, that von Gunten had failed to proffer evidence that MDE took adverse employment action against her. Accordingly, resolution of this appeal hinges on whether von Gunten

offered evidence that she suffered an "adverse employment action." The parties disagree as to how the district court defined "adverse employment action," what the appropriate standard is, and whether MDE engaged in such conduct, properly defined.

II.

Von Gunten (and the EEOC) contend that the district court too narrowly defined the adverse employment action necessary [*864] to prove a § 2000e-3 retaliation claim as an "ultimate employment decision" involving hiring, granting leave, discharging, promoting, or compensating. MDE argues that the district court did no such thing. Rather, according to MDE, the court included within the definition of adverse employment action any conduct by the employer that discriminatorily alters the terms, conditions, or benefits of employment.

Sometimes the practical differences between these two standards are difficult [**10] to discern. For example, although the majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases, they have nonetheless recognized that "there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (collecting cases). Also indicative of the sometime slight real world difference between the two standards is the fact that while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. See e.g., *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (ultimate employment decision includes "tangible change in duties or working conditions that constituted a material employment disadvantage"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, "papering" of an employee's [**11] file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended").

However, if strictly applied, use of the "ultimate employment decision" standard can be outcome determinative, as is crystalized in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). There, the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3. In *Mattern*, the court reversed a jury verdict finding that an employer had discriminatorily retaliated against an employee who had charged sexual harassment. *Id.* at 703-04. The employee produced evidence that her employer had reviewed her work negatively causing her to lose a pay increase, required her to wear an unsafe fire protection suit, verbally threatened to fire her, improperly placed in jeopardy her continuance in an apprenticeship program, and committed numerous other acts of harassment causing her to suffer depression and panic attacks requiring a doctor's care and medication. *Id.* at 705-706, [**12] 713-14 (Dennis, J. dissenting). In reaching its conclusion that none of these acts, either individually or collectively, constituted adverse employment action, the Fifth Circuit relied on differences in the language of Title VII's general antidiscrimination provision, 42 U.S.C. § 2000e-2 (1994), and its anti-retaliation provision, 42 U.S.C. § 2000e-3. *Id.* at 708-09. The court noted that § 2000e-2(a)(2) made it unlawful for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," (emphasis added), and contrasted this language with that in the anti-retaliation provision, § 2000e-3, which simply forbids "discrimination" against "any" employee. *Id.* at 709. The *Mattern* court concluded:

The anti-retaliation provision speaks only of "discrimination"; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, the anti-retaliation provision can only be read to exclude such vague harms, and to include [**13] only ultimate employment decisions

Id. (emphasis added).

If this circuit employed a similar "ultimate employment decision" standard in retaliation [*865] cases, then indisputably von Gunten would be unable to mount a *prima facie* case. This is so because none of MDE's retaliatory acts constituted an ultimate employment decision -- none involved hiring, firing, refusal to promote, or the like.

But "ultimate employment decision" is not the standard in this circuit. As noted above, see note 1, we have expressly rejected distinctions, like those drawn by the Mattern court, between § 2000e-2 and § 2000e-3, reasoning that "conformity between the provisions of Title VII is to be preferred." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985). Moreover, in *Ross*, we also implicitly rejected the Mattern court's view that nothing less than an "ultimate employment decision" can constitute adverse employment action under § 2000e-3.

In *Ross*, the plaintiff charged that his employer retaliated against him for engaging in protected activity by engaging in retaliatory harassment including reducing his job "responsibilities[**14] and professional status," denying him "a performance review and annual salary and benefit increases," and providing "false information" to prospective employers. *Id.* at 357. After concluding that the district court improperly relied on the preclusive effect of a state administrative determination to grant summary judgment to the employer, we reversed and remanded *Ross*'s retaliatory harassment claim for "reconsideration of the propriety of summary judgment" and "for trial" if necessary. *Id.* at 363. In doing so, we recognized that these alleged acts of retaliatory harassment, if proved, could constitute adverse employment action; otherwise remand would have been unnecessary. See also *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (recognizing retaliatory harassment claim).

In our most recent discussion of "adverse employment action" under § 2000e-3, *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 242 (4th Cir. 1997), we quoted and followed *Ross*. Although we held that the challenged retaliatory acts of the employer did not constitute adverse employment action, this was not because those acts failed[**15] to rise to the level "ultimate employment decisions," but because *Munday* offered no evidence that those acts "adversely affected" the "terms, conditions, or benefits" of her employment. *Id.* at 243. *Munday* alleged that after she had settled her sexual harassment and discrimination claims, her supervisors yelled at her upon hearing a rumor that she had planned to sue the company again, instructed other employees "not to socialize" with her, to "avoid her as much as possible," and to "report back" anything she said. *Id.* at 241. n2 We refused to hold that such conduct constituted adverse employment action, reasoning: "In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected." *Id.* at 243 (emphasis added).

-----Footnotes-----

n2 *Munday* was also "subjected to a number of work related unpleasanties." However, she complained of them and her employer "adequately investigated and addressed" them. *Munday*, 126 F.3d at 242.

-----End Footnotes-----

[**16]

Although we have never before expressly so held, see *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 n.11 (4th Cir. 2000), *Ross* and *Munday* teach that [HN4] conduct short of "ultimate employment decisions" can constitute adverse employment action for purposes of § 2000e-3. Of course, "ultimate employment decisions" -- to hire, discharge, refuse to promote, etc. -- can constitute the necessary adverse employment action, but "retaliatory harassment" can also comprise adverse employment action. See *Ross*, 759 F.2d at 363. What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected "the terms, conditions, or benefits" of the plaintiff's employment. *Munday*, 126 F.3d at 243.

[*866] We think it highly unlikely that the experienced district judge in the case at hand would have failed to recognize the teaching of *Ross* and *Munday*. In fact, the district judge expressly cited and quoted *Munday*, apparently recognizing that "evidence that the terms, conditions, or benefits of employment were adversely effected" is the sine qua non of an "adverse employment[**17] action." *Von Gunten v. Maryland Dep't of Env't*, 68 F. Supp. 2d 654, 662 (D. Md. 1999) (quoting *Munday*, 126 F.3d at 243). The confusion as to what standard the district court followed has emerged because the court also quoted *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981), and noted that when "determining whether there had been discrimination with respect to 'personnel actions' taken by the defendant," we there focused on "whether there had been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating." *Von Gunten*, 68 F. Supp. 2d at 662. This

243 F.3d 858, *; 2001 U.S. App. LEXIS 4129, **;
85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

accurate quotation of Page is nothing more than recognition that adverse employment action includes "ultimate employment decisions." Given the remainder of the district court's excellent analysis and its express determination that "the essential terms, conditions and benefits" of von Gunten's employment "were not adversely affected by actions" taken by MDE, id. at 663, we cannot interpret the quotation from Page as improperly restricting § 2000e-3 adverse[**18] employment action to "ultimate employment decisions." n3

-----Footnotes-----

n3 Contrary to the suggestion of the Mattern court, 104 F.3d at 707, Page, itself, provides no basis for such a restriction. In Page, a federal postal employee, who had been denied promotions, sued the Postmaster General, claiming racial discrimination because the committee designated to review his qualifications for promotion contained no African-Americans. Page, 645 F.2d at 229. Significantly, in Page, the employee sued not under § 2000e-3, which proscribes retaliation in the private sector, but under § 2000e-16, an anti-discrimination provision that applies only to federal-sector employees. See id. at 228. Section 2000e-16 provides in relevant part that "all personnel actions" shall be free from any discrimination. 42 U.S.C. § 2000e-16 (1994). We reasoned in Page that inclusion of the term "personnel action" in § 2000e-16 indicated that "ultimate employment decisions" arose to "the general level of decision" targeted by Congress in that statute. Id. at 233. See also Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999) (citing Page in another federal sector case). Of course, § 2000e-3 does not confine its reach to "personnel actions" and thus this reasoning simply does not apply to retaliation actions, like the one at hand. Moreover, our fundamental concern in Page was that the pretext inquiry must focus on the employment decision itself, not the racial composition of a selection committee; if discrimination drove the employment decision, a Title VII action might lie, but discrimination that only effected the makeup of a selection committee could not be the basis for a Title VII action. Page, 645 F.2d at 233. Finally, even in the public sector context, Page did not hold, as Mattern does, that "hiring, granting leave, discharging, promoting, and compensating" was an exhaustive list of what constituted an "ultimate employment decision." Mattern, 104 F.3d at 707-08. Rather, we expressly explained that there are other actions that meet this definition. See Page, 645 F.2d at 233.

-----End Footnotes-----

[**19]

In sum, we continue to believe that the standard articulated in Ross and Munday most accurately reflects what Congress intended as requisite for a § 2000e-3 retaliation action. [HN5] Adverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the "terms, conditions, or benefits" of employment. Munday, 126 F.3d at 243. Moreover, we believe that the district court recognized that this was the governing standard. Accordingly, we turn to the final question -- did the district court properly apply this standard. n4

-----Footnotes-----

n4 We note that the First, Ninth, Tenth, and Eleventh Circuits have similarly held that Title VII's protection against retaliatory discrimination extends to adverse acts that fall short of ultimate employment decisions. See Fielder v. UAL Corp., 218 F.3d 973, 984 (9th Cir. 2000); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455-56 (11th Cir. 1998); Berry v. Stevenson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994).

-----End Footnotes-----

[**20] [*867]

III.

Von Gunten contends that the following conduct by MDE constituted adverse employment action: (1) withdrawing the use of a state vehicle; (2) "downgrading" her year-end performance review; (3) reassignment to shoreline survey work; (4) improper treatment of various administrative matters; and (5) retaliatory harassment creating a hostile work environment. We consider each of these in turn.

A.

Von Gunten initially asserts that MDE's decision to deny her use of a state vehicle constitutes an adverse employment action. On December 19, 1996, six days after von Gunten brought her discrimination claims to MDE's Office of Fair Practices, Steinfort informed her that she could no longer use the state vehicle assigned to her during the preceding eleven months because it had to be reallocated to MDE employees who had greater need for a state vehicle. For the next six months, von Gunten had to use her own vehicle in her work (and obtain reimbursement for mileage). In early June 1997, MDE provided her with another state vehicle.

Temporary withdrawal of use of a state vehicle in these circumstances does not constitute an adverse employment action. First, it is not at all clear that use[**21] of a state vehicle constituted a benefit of von Gunten's employment. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 75, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (opportunity to become partner in a law firm was an employment benefit protected by Title VII because it was "part and parcel of the employment relationship"). Von Gunten herself concedes that "MDE was not obligated to provide her a state vehicle." Brief of Appellant at 39. Moreover, considerable uncontested evidence establishes that von Gunten could not have reasonably expected that she would enjoy permanent use of a state vehicle. For example, Steinfort testified, without contradiction, that the withdrawal of von Gunten's state vehicle comported with MDE's "fleet policy" allocating vehicles "to the highest users for financial reasons" and that "other members of the unit were working intercounties [sic] and traveling as much as 100 miles before reaching their survey areas," unlike von Gunten, who lived very close to hers. Furthermore, even if use of the state vehicle was a protected employment benefit, von Gunten has utterly failed to proffer evidence that elimination of this benefit adversely affected her. [**22] To the contrary, MDE fully compensated von Gunten for the mileage she put on her personal vehicle during the period in which a state vehicle was unavailable, and assigned another state vehicle to her in early June 1997, along with a state gas card.

B.

Von Gunten next maintains that MDE's "downgrading" of her year-end review constituted an adverse employment action. Undoubtedly, [HN6] a retaliatory downgrade of a performance evaluation could effect a term, condition, or benefit of employment. See, e.g., *Spears v. Missouri Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000) ("unfavorable evaluation" constitutes an adverse employment action when used "as a basis to detrimentally alter the terms or conditions of the recipient's employment"). But the facts of this case, even viewed in the best light for von Gunten, unequivocally establish that the challenged action did not do that here. n5

-----Footnotes-----

n5 Von Gunten also contends that MDE's postponement of the year-end review from January 1997 to February 1997 and changes to her initial six-week job evaluation constitute adverse employment actions. No record evidence indicates that the one-month postponement adversely effected von Gunten in any way. As for the initial six-week evaluation, Beatty, von Gunten's supervisor, changed her initial evaluation because he had filled it out incorrectly -- assessing her first six weeks of work rather than stating aspirational goals in light of that work. Although his original comments were positive, the changes were minor and in any event only concerned her first six weeks at MDE; these changes had no effect on anything.

-----End Footnotes-----

[**23] [*868]

At the time of von Gunten's year-end review, MDE was in the process of changing from one kind of evaluation form to another and so evaluated von Gunten on both forms. On the old form, in which a supervisor could rate an employee as "deficient," "needs improvement," "competent," "highly competent," or "excellent," von Gunten's supervisor rated her as "needing improvement." On the new form, with only three available ratings -- "unsatisfactory," "satisfactory," or "superior" -- he rated her "unsatisfactory" in three categories, and "satisfactory" in two, with an overall "unsatisfactory" rating. However, because the supervisor believed that his overall rating was not entirely representative of von Gunten's

243 F.3d 858, *; 2001 U.S. App. LEXIS 4129, **;
85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

performance in 1996, he also recommended that she be granted a salary increase, and she in fact received that salary increase.

As we understand von Gunten's contention, she does not challenge her "needs improvement" year-end rating on the old form. Cf. *Spears*, 210 F.3d at 854 ("A poor performance does not in itself constitute an adverse employment action because it has no tangible effect on the recipient's employment"). Rather, her argument focuses solely on the differences[**24] between the old form's "needs improvement" rating and the new form's "overall unsatisfactory" rating. She contends the latter is a "downgrade" of the former. We have difficulty in discerning any significant difference between the two. Even accepting the notion that a rating of "needs improvement" may differ slightly from that of "overall unsatisfactory," this distinction had no practical consequences for von Gunten because MDE still granted her a pay raise. Thus, the terms, conditions, and benefits of von Gunten's employment were in no way jeopardized.

C.

Von Gunten also argues that her reassignment to shoreline survey work, after she asked to be separated from Burch, constitutes an adverse employment action because although she did not suffer a decrease in pay, benefits, or job title, the "nature of [her] work at MDE did change significantly." Brief of Appellant at 44. Specifically, von Gunten asserts that the change in job assignment was "significantly detrimental and not trivial," that it prevented her from pursuing a boat captain's license, "exposed her to dangerous pathogens," and subjected her to less appealing working conditions, namely, "more burdensome paperwork and daily[**25] interaction with the public." *Id.* at 45.

If the change in von Gunten's job assignment truly had been significant, if, for example, it exposed her to more dangerous conditions or stifled advancement by preventing her from obtaining a professional license, then her contention would have merit. See *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 970, 994 (C.D. Cal. 2000) (adverse employment action where employer failed to forward plaintiff's medical board documents that were crucial to board's granting of plaintiff's medical license). But even von Gunten concedes that a captain's license was not a requirement of the job, nor could it enhance her job status; she admits that she simply wished to pursue a captain's license as a personal goal. Additionally, while we agree in principle that increased exposure to dangerous pathogens could adversely effect the terms, condition, or benefits of employment, von Gunten has failed to proffer any credible evidence that her exposure to these chemicals did in fact increase in the new assignment.

As for the other changes that made the new assignment less appealing to von Gunten -- more shoreline duty, less boat work, and[**26] more interaction with the public -- we cannot hold that these constituted an adverse employment action. Removing von Gunten from all boat work was only temporary while MDE sought new boat work opportunities for her. Moreover, this change in working conditions largely resulted from von Gunten's own request to be removed from Burch's boat. MDE appears to have accommodated that request as best as it could in light of the [*869] fact that there were no other positions available on other boats. Nothing in the record indicates that MDE did not put forth a good faith effort to find von Gunten the boat work that she desired. We do not suggest that an employee, who believes that she is the victim of unlawful discrimination or retaliation, must agree to a reassignment to avoid jeopardizing her Title VII claim. But if, as here, an employee, who believes she has been sexually harassed, requests reassignment and her employer reassigns her to the only available job, then a court must view with some skepticism that employee's claim that the reassignment constituted an adverse employment action.

D.

Additionally, von Gunten argues that MDE mishandled various administrative issues, creating "a continual[**27] campaign of retaliation" against her, which constitutes adverse employment action. Brief of Appellant at 46.

For instance, von Gunten contends that on January 9, 1997, Beatty and Steinfert began "hyper-scrutinizing" her sick leave, informing her that she needed to provide documentation for all prior and future sick leave, after she had taken days off on Christmas Eve and New Year's Eve for doctor's appointments. She also maintains that on that same day MDE improperly responded to a citizen's complaint lodged against her by writing her up and placing her on administrative leave with pay for a short time to allow investigation of the matter. But [HN7] terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from a state agency's disciplinary procedures. See *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 484 (7th Cir. 1996) (no adverse employment action where employer enforces a generally

243 F.3d 858, *, 2001 U.S. App. LEXIS 4129, **;
85 Fair Empl. Prac. Cas. (BNA) 385; 80 Empl. Prac. Dec. (CCH) P40,515

applicable policy against employee). Moreover, we fail to see how MDE's demands that von Gunten comply with sick leave policy adversely affected her employment. Nor do we [**28]attribute any adverse effects in relation to the citizen's complaint to MDE -- if anything, they were the result of von Gunten's own conduct.

Von Gunten also maintains that the manner in which MDE implemented its sick leave and disciplinary policies against her constitutes an adverse employment action. She asserts that Beatty did not ask any other employees to provide written documentation for their absences, or treat any other employee charged with a citizen complaint as severely as von Gunten. This might be evidence of pretext, see *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 200 (3d Cir. 1996) (relied on by von Gunten), but it is not evidence of adverse employment action.

Von Gunten additionally offers a laundry list of job occurrences during 1997 that annoyed her and assertedly constitute adverse employment actions. For example, von Gunten claims that: (1) throughout the year she continued to be hyper-criticized for her requests for leave and her expense forms; (2) Beatty often turned down her requests to attend seminars, saying he needed her in the field, while in 1996 he had usually approved such requests; (3) when she visited the field office, an employee[**29] followed her around and questioned her activities; and (4) the MDE Fair Practices Office did not adequately deal with her complaints. We have carefully reviewed the record and, although these occurrences may have irritated von Gunten, no evidence indicates that they actually adversely effected a term, condition, or benefit of her employment. Thus, they do not constitute adverse employment action.

E.

Finally, von Gunten asserts that MDE subjected her to retaliatory harassment creating a hostile work environment. [HN8] Retaliatory harassment can constitute adverse employment action, see *Ross*, 759 F.2d at 363-64, but only if such harassment adversely affects the "terms, conditions, [*870] or benefits of her employment." *Munday*, 126 F.3d at 243.

Von Gunten's retaliatory harassment claim fails. [HN9] For a hostile work environment claim to lie there must be evidence of conduct "severe or pervasive enough" to create "an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1983). The plaintiff's burden of proof in this regard is twofold: she must show that[**30] her workplace was both subjectively and objectively hostile. *Id.* The sole basis for von Gunten's claim is the actions outlined above, "in their totality." Brief of Appellant at 54. We have no doubt that these acts upset von Gunten to a degree that she subjectively perceived her work environment at MDE to be abusive. However, there is no evidence that they created "an environment that a reasonable person would find hostile or abusive." *Id.* Rather, the acts von Gunten alleges occurred episodically over a year and a half and were not so severe that a reasonable person would find them abusive. They merely involved the imposition of generally applicable departmental policies, good faith responses to von Gunten's request to be moved away from Burch, administrative difficulties in implementing a new performance evaluation system, and non-actionable office unpleasanties that were at most the result of "predictable tension" in the workplace following the lodging of discrimination and retaliation charges. See, e.g., *Raley v. Bd. of St. Mary's County Comm'rs*, 752 F. Supp. 1272, 1281 (D. Md. 1990).

IV.

For the foregoing reasons, we affirm the judgment of the district[**31] court.

AFFIRMED

EDWARD L. WHOLEY v. SEARS, ROEBUCK AND CO., ET AL.
No. 105, September Term, 2001

COURT OF APPEALS OF MARYLAND

370 Md. 38; 803 A.2d 482; 2002 Md. LEXIS 371; 18 BNA IER CAS1313

June 19, 2002, Filed

SUBSEQUENT HISTORY: [***1] As Corrected June 20, 2002.

PRIOR HISTORY: Certiorari to the Court of Special Appeals (Circuit Court for Anne Arundel County). Ronald Silkworth, JUDGE.

Sears, Roebuck & Co. v. Wholey, 139 Md. App. 642, 779 A.2d 408, 2001 Md. App. LEXIS 128 (2001).

DISPOSITION: Affirmed with costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee filed a complaint against defendants, employer and supervisor, alleging wrongful discharge and defamation. A jury returned a verdict in favor of the employee on the wrongful discharge count as to the employer only. The employee appealed from the judgment of the Court of Special Appeals (Maryland) which reversed that judgement, holding that no clear mandate of public policy was implicated in terminating the employee.

OVERVIEW: The employee was employed by the employer as a security officer for 24 years. His duties included investigating suspicious behavior and reporting thefts of the store's merchandise by both customers and employees. He had observed suspicious activity by the manager and had contacted his superior who approved the use of a video camera. However, his superior subsequently told him to remove the camera because his superiors ordered its removal. Fewer than two months later, the employee was fired. The appellate court held that terminating employment on the grounds that the employee, as a victim or witness, gave testimony at an official proceeding or reported a suspected crime to the appropriate law enforcement or judicial officer was wrongful and contrary to public policy. However, to qualify for the public policy exception to at-will employment, the employee had to report the suspected criminal activity to the appropriate law enforcement or judicial official, not merely investigate suspected wrong-doing and discuss that investigation with co-employees or supervisors. Thus, the exception did not apply to the employee.

OUTCOME: The judgment of the lower appellate court was affirmed.

CORE TERMS: public policy, wrongful discharge, reporting, criminal activity, at-will, retaliation, duty, suspected criminal, store manager, cause of action, termination, discharged, public employees, state employees, alarm, public policy exception, manager, wrongful discharge claim, common law, investigating, law enforcement authorities, whistleblower, supervisor, terminated, plurality, camera, fired, whistleblowing, declaration, regulation

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN1] The viability of a legal cause of action is clearly a question of law which, as with all questions of law, the appellate court reviews de novo.

Civil Procedure: Appeals: Standards of Review: De Novo Review

[HN2] Whether a plaintiff identifies a public policy is a question of law to be decided by the court.

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

Labor & Employment Law: Wrongful Termination: Public Policy

[HN3] An at-will employee has an employment contract of infinite duration which is terminable for any reason by either party. The tort of wrongful discharge is one exception to the well-established principle that an at-will employee may be discharged by his employer for any reason, or no reason at all. Maryland has joined a growing number of states which have adopted a "public policy exception" to the common notion of at-will employment by holding, specifically, that an employee who has been discharged in a manner that contravenes public policy may maintain a cause of action for abusive or wrongful discharge against his former employer.

Labor & Employment Law: Wrongful Termination: Public Policy

[HN4] To establish wrongful discharge, an employee must be discharged, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee.

Governments: Courts: Common Law

[HN5] Maryland's common law is not static; it may be modified by judicial decision when changing circumstances compel courts to renovate outdated law and policy.

Labor & Employment Law: Wrongful Termination: Public Policy

[HN6] Terminating employment on the grounds that the employee, as a victim or witness, gave testimony at an official proceeding or reported a suspected crime to the appropriate law enforcement or judicial officer is wrongful and contrary to public policy.

Labor & Employment Law: Wrongful Termination: Public Policy

[HN7] To qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to the appropriate law enforcement or judicial official, not merely investigate suspected wrong-doing and discuss that investigation with co-employees or supervisors.

COUNSEL: ARGUED BY James Brewster Hopewell of Riverdale, MD FOR PETITIONER.

ARGUED BY Michael Nicholas Petkovich (Jackson, Lewis, Schnitzler & Krupman, on brief) of Washington, D.C. FOR RESPONDENTS.

JUDGES: ARGUED BEFORE Bell, C.J.; Eldridge, Raker, Wilner, Cathell, Harrell, and Battaglia, JJ. Concurring Opinion by Raker, J., in which Wilner, J., joins. Dissenting Opinion by Eldridge, J., in which Bell, C.J., joins. Opinion by Battaglia, J.

OPINIONBY: Battaglia

OPINION: [*43] [**484]

Opinion by Battaglia, J.

The decisional issue before this Court is whether Maryland recognizes a common law public policy exception to the at-will employee doctrine whereby discharging an employee for investigating and reporting the suspected criminal activity of a co-worker would constitute a wrongful discharge. We conclude that a clear public policy mandate exists in the State of Maryland which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities. While we recognize such an exception, the petitioner's actions in this case, i.e. the investigation of suspected criminal activity of a store manager and reporting of that suspicion to his supervisors, do not qualify for this exception.

I. Background

The petitioner, Edward L. Wholey, was employed by the respondent, Sears, Roebuck and Co. ("Sears"), at its Glen Burnie, Maryland store as a security officer for twenty-four years, from February, 1972 until February, [***2] 1996. The petitioner had law enforcement experience prior to joining Sears, and he maintained his status and employment as a law

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

enforcement officer during much of his tenure with Sears, with the full knowledge and approval of [**485] the company. n1 Within six [*44] months of commencing his employment at Sears, the petitioner was promoted to Assistant Security Manager, and in 1980, he was promoted to Security Manager. The petitioner's assigned duties included investigating suspicious behavior and reporting thefts of the store's merchandise by both customers and employees.

-----Footnotes-----

n1 The petitioner was a Baltimore City police officer from 1968-69 and was a security officer at Montgomery Ward for some time after that. During his tenure at Sears, the petitioner was employed as a Constable of the District Court of Maryland from 1973-1980. In 1980, with Sears's approval, the petitioner became a deputy with the Anne Arundel County Sheriff's Office, and continues to be employed by the Anne Arundel County Sheriff's office as a Corporal.

-----End Footnotes-----

[***3]

In March of 1995, the petitioner observed the manager of the Glen Burnie store take merchandise from the store floor into his personal office, itself a violation of company policy. The merchandise would then disappear from the manager's office. Several similar observations occurred throughout 1995, and the petitioner reported this suspicious behavior to his superior, the District Manager for Security, John Eiseman ("Eiseman"), who told the petitioner to maintain his scrutiny.

The suspicious activity continued; various Sears items were observed in the manager's office, with price tags still attached and no evidence of receipts for payment. When the petitioner informed Eiseman that the manager continued to take store merchandise into his office, and that the merchandise would subsequently disappear from his office, Eiseman offered the petitioner the use of a surveillance van so that the petitioner could, on occasion, observe the manager from outside the store. The manager's suspicious conduct continued, however, and the petitioner suggested to Eiseman that they install a camera to monitor his activities with respect to the disappearing merchandise. According to the petitioner, Eiseman[***4] approved the request and in the early morning of December 16, 1995, the petitioner and Darlene Hill, the Loss Control Manager at Sears and one who had also observed similar suspicious activity by the manager, installed a camera. Later that day, the petitioner informed Eiseman that the camera was installed and suggested that Eiseman inform his superior, the District Store Manager, about the camera installation. Sometime [*45] within the following two hours, Eiseman instructed the petitioner to remove the camera from the store because his superiors ordered its removal, asserting that a store manager was entitled to more respect. The camera was immediately removed and the investigation of the manager was thereafter discontinued.

Fewer than two months later, on February 6, 1996, the petitioner was fired from his position. Eiseman had met with the petitioner a few days earlier and told him that his superiors disliked the petitioner's "cop mentality," and did not approve of the petitioner's handling of the investigation of the manager, particularly with regard to the installation of the camera in the manager's office. Eiseman told the petitioner to resign, and should he refuse to resign, he advised[***5] the petitioner that he would be fired. The petitioner refused to resign and, therefore, was fired. Sears alleged that the termination was the result of a security problem that occurred at the store during a blizzard in January of 1996. n2

-----Footnotes-----

n2 Sears contracted with ADT to monitor the perimeter alarms at the store. ADT was to report any alarm calls to the Anne Arundel County Police Department ("AACPD"), and then to a Sears employee from a list of authorized persons. During the petitioner's employment, however, the Sears policy for alarm response changed, largely due to the fact that the AACPD began imposing fines on Sears for having to respond to excessive false alarms. Thus, Sears required ADT to first contact a Sears employee from the authorized list; once contacted, the employee had the discretion to determine whether to contact the police. The petitioner was an authorized employee-contact. On January 7, 1996, at approximately 10:20pm, ADT contacted the petitioner at his home because the store alarm had sounded. ADT advised that the alarm had likely gone off due to a power outage from the blizzard conditions. The petitioner informed ADT that he was unable to personally respond because he was snowed in at his home; he instructed ADT to call the AACPD. The petitioner then called the AACPD himself to ensure that the alarm call would be investigated. The police arrived at the scene and

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

because there were no signs of forced entry, the police cleared the alarm. The police also described the blizzard conditions in the report and explained that store employees could not report to the store because of the severe weather conditions. A few days later, it was discovered that the store had been robbed on the evening of January 7 between 8:00-9:00pm; an employee's authorization code was used to open twenty five cash registers. Despite the obvious disparity between the time the robbery occurred and the time the alarm was sounded, Sears alleged that the petitioner's disregard for company property and failure to respond to the store alarm was the basis for petitioner's termination. We will assume, as did our colleagues in the Court of Special Appeals, that Sears discharged the petitioner for his investigation of the store manager, and not for any failure or fault in the petitioner's actions. See *Sears Roebuck & Co., Inc., v. Wholey*, 139 Md. App. 642, 779 A.2d 408 (2001).

-----End Footnotes-----

***6] [*46] **486]

The petitioner asserts that such a basis was merely pretextual and that the true reason for his termination was retaliation for the petitioner's investigation of the store manager for theft. The only issue on appeal, before both this Court and the Court of Special Appeals, is whether Maryland recognizes a public policy mandate regarding the investigation and reporting of criminal activity such that the discharge of an at-will employee for such would be unlawful. Given that instructions to the jury and the jury's verdict thereafter make plain that the jury found the motive for the petitioner's discharge to be his investigation of the store manager, given that the sufficiency of those findings is not at issue, and given that in either case, we view evidence in the light most favorable to the plaintiff (the petitioner) on a defendant's motions for summary judgment and judgment notwithstanding the verdict (J.N.O.V.), see *Caldor, Inc. v. Bowden*, 330 Md. 632, 636, 625 A.2d 959, 960 (1993) (quoting *Kentucky Fried Chicken Nat'l Management Co. v. Weathersby*, 326 Md. 663, 666, 607 A.2d 8, 9 (1992)), we proceed under the assumption that the sole reason for the ***7]petitioner's termination was for his investigation of the store manager, and subsequent reporting to his supervisor at Sears, and not for any failure to handle a security matter as Sears initially alleged.

Seven months after he was terminated, the petitioner filed a complaint in the Anne Arundel County Circuit Court against Sears and Eiseman, alleging wrongful discharge and defamation (based on a document written by Eiseman regarding the reasons for the petitioner's discharge) against each defendant. With respect to the wrongful discharge claim, Sears filed a motion to dismiss and a motion for summary judgment which similarly argued that, assuming the facts as alleged by the [*47] petitioner, the termination from at-will employment did not violate a clear mandate of public policy and thus was not actionable. Both motions ultimately were denied. Sears again advocated that position when it moved for judgment at the close of the petitioner's case and at the close of trial. In each instance, the petitioner responded, and the trial court ultimately agreed, that Maryland public policy favors the investigation and prosecution of crimes, and thus the petitioner's termination contravened a clear ***8] mandate of public policy.[**487]

With respect to the wrongful discharge claim, the trial court instructed the jury, over Sears's objection, as follows:

In order to recover for wrongful discharge, [the petitioner] must show, one, an at-will employment relationship; two, that he was terminated by the employer and that the discharge was contrary to a clear mandate of public policy. . .

Now, there is a clear public policy in Maryland favoring the investigation and prosecution of criminal offenses.

If you find that the motivation of [Sears] in firing [the petitioner] was in retaliation to [the petitioner's] investigatory activities, then that motivation would contravene the stated public policy of Maryland. You must also find that [the petitioner's] investigatory activities were lawful and in accordance with the stated procedures set forth by [Sears].

A jury returned a verdict in favor of petitioner against the respondent, Sears, on the wrongful discharge count. The jury returned verdicts in favor of Sears on the defamation count and in favor of Eiseman on both the defamation and wrongful discharge counts. Sears appealed the judgment on the wrongful discharge count to the Court***9] of Special Appeals.

The Court of Special Appeals reversed the judgement of the Circuit Court, holding that "no clear mandate of public policy was implicated in Sears's termination of [the petitioner's] employment, as a matter of law." See 139 Md. App. 642, 660, 779 A.2d 408, 419 (2001).

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

The petitioner sought, and we granted, a writ of certiorari to consider whether there exists a clear public policy mandate in Maryland with respect to the investigation and reporting of [*48] criminal activity such that terminating an at-will employee for his/her involvement in investigating the possible criminal activity of another employee constitutes a wrongful discharge. See *Wholey v. Sears Roebuck*, 367 Md 88, 785 A.2d 1292 (2001)

II. Discussion

The pivotal issue in this case is whether a clear mandate of public policy favoring the investigation and reporting of suspected criminal activity exists in Maryland such that the termination of an at-will employee who acted congruent with this public policy is wrongful. Whether the petitioner may maintain a cause of action against Sears is dependent upon favorable resolution of this issue, and further, that he meets[***10] the requirements to sustain this cause of action, should one be adopted. [HN1] The viability of a legal cause of action is clearly a question of law which, as with all questions of law, this Court shall review de novo. See *Register of Wills for Balt. County v. Arrowsmith*, 365 Md. 237, 249, 778 A.2d 364, 371 (2001) ("As is consistent with our review for all questions of law, we review the order and judgment de novo."); *Watson v. Peoples Security Life Ins. Co.*, 322 Md. 467, 478, 588 A.2d 760, 765 (1991)(stating that "it is for the court to determine, on any state of facts generated by the evidence, whether the relevant public policy considerations constitute the [requisite]'clear mandate'" of public policy); see also *Strozinsky v. School District of Brown Deer*, 2000 WI 97, 614 N.W.2d 443, 448, 237 Wis. 2d 19 (Wis. 2000)(stating that [HN2] "whether a plaintiff identifies a public policy is a question of law to be decided by the court").

A. The Tort of Wrongful Discharge

[HN3] An at-will employee, such as the petitioner, has an employment contract of infinite duration which is terminable for any reason by either party. n3 See *Suburban [**488] Hosp., Inc. v. Dwiggins*, 324 Md. 294, 303, 596 A.2d 1069, 1073 (1991);[***11] *Adler v. American Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464, [*49] 467(1981). The tort of wrongful discharge is one exception to the well-established principle that an at-will employee may be discharged by his employer for any reason, or no reason at all. n4 See *Adler*, 291 Md. at 35, 432 A.2d at 467. See also *Ewing v. Koppers Co., Inc.*, 312 Md. 45, 49, 537 A.2d 1173, 1174 (1988) (holding that the tort of wrongful discharge is also available to contractual employees). When this Court recognized the wrongful discharge tort in *Adler*, 291 Md. at 36-37, 432 A.2d at 467, we joined the growing number of states which have adopted a "public policy exception" to the common notion of at-will employment by holding, specifically, that an employee who has been "discharged in a manner that contravenes public policy" may "maintain a cause of action for abusive or wrongful discharge against his former employer." 291 Md. at 35-36, 432 A.2d at 467. See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1130 (Alaska 1989); *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1033 (Ariz. 1985); [***12] *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380, 385 (Ark. 1988); *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 1333, 164 Cal. Rptr. 839 (Cal. 1980)(citing *Petermann v. Int'l Bhd. of Teamsters* 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. 1959)); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 387 (Conn. 1980); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (Haw. 1982); *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876, 878-79, 52 Ill. Dec. 13 (Ill. 1981); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425, 428 (Ind. 1973); *Coleman v. Safeway [*50] Stores, Inc.*, 242 Kan. 804, 752 P.2d 645, 647 (Kan. 1988); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730, 732 (Ky. 1983); *Luethans v. Washington Univ.*, 894 S.W.2d 169, 171 n.2 (Mo.1995)(discussing *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985)); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127, 129-30 (Mont. 1980); *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510, 514-15 (Neb. 1987);[***13] *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394, 396-97 (Nev. 1984); *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273, 1274 (N.H. 1980)(citing *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549, 551 (N.H. 1974)); *Chavez v. Manville Products Corp.*, 108 N.M. 643, 777 P.2d 371, 375 (N.M. 1989); *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445, 447 (N.C. 1989); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 794-95 (N.D. 1987); *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24, 28 (Okla. 1989); *Delaney v. Taco Time Int'l, Inc.*, 297 Ore. 10, 681 P.2d 114, 117 (Or. 1984)(citing *Nees v. Hocks*, 272 Ore. 210, 536 P.2d 512 (Or. 1975) and *Brown v. Transcon Lines*, 284 Ore. 597, 588 P.2d 1087 (Or. 1978)); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 180 (Pa. 1974); *Ludwick v. This Minute of Carolina, [**489]Inc.*, 287 S.C. 219, 337 S.E.2d 213, 216 (S.C. 1985); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227 (S.D. 1988); *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797, 801 (Va. 1985);[***14] *Payne v. Rozendaal*, 147 Vt. 488, 520 A.2d 586, 589-90 (Vt. 1986); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081,

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

1089 (Wash. 1984); Harless v. First Nat'l Bank in Fairmont, 162 W. Va. 116, 246 S.E.2d 270, 275 (W. Va. 1978); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834, 840 (Wis. 1983); Griess v. Consolidated Freightways Corp. of Delaware, 776 P.2d 752, 754 (Wyo. 1989). n5

-----Footnotes-----

n3 In the petitioner's application for employment, the petitioner acknowledged that his "employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either [Sears] or [the petitioner]."

n4 Other exceptions to at-will employment include those prescribed by federal and state legislation such as, among others, Title VII of the Civil Rights Act of 1964, 42 U.S.C., §§ 2000e-2000e-17 (1994)("Title VII"), the Fair Employment Practices Act ("FEPA"), Maryland Code (1957, 1993 Rep. Vol.), Art. 49B §§ 14-18, which prohibit basing employment decisions on race, gender, and other suspect classes, the National Labor Relations Act, 29 U.S.C. § 158 (1998), which prevents discharges for union activities, and Section 5-604(b) of the Labor and Employment Article which prohibit terminating an employee for reporting violations of the occupational safety and health regulations. [***15]

n5 This list of cases is by no means exhaustive of all of the jurisdictions that have stated a public policy remedy. Some jurisdictions have recognized an implied covenant of good faith and fair dealing in a contract action or a tort action for wrongful discharge. See Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989)(contract); Gates v. Life of Montana Ins. Co., 205 Mont. 304, 668 P.2d 213, 214-15 (Mont. 1983)(tort); Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505, 512 (N.J. 1980)(contract).

-----End Footnotes-----

Thus, [HN4] to establish wrongful discharge, the employee must be discharged, the basis for the employee's discharge [*51] must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee. See Wholey, 139 Md. App. at 649, 779 A.2d at 412 (quoting Shapiro v. Massengill, 105 Md. App. 743, 661 A.2d 202, 213 (1995)). That the petitioner was discharged and that the basis for the petitioner's discharge was his investigation[***16] of the store manager and subsequent reporting to his supervisors have been clearly established. Our task is to consider whether a clear mandate of public policy exists in Maryland which would prohibit the discharge of an at-will employee for his investigation of suspected criminal activity of a co-worker and reporting to his supervisors thereof. In so considering, we will attempt to clarify the somewhat obscure concept of "public policy" and the considerations which we believe compel or spurn the adoption of such a mandate.

B. Public Policy Exception

To be certain, [HN5] our common law is not static; it may be modified by judicial decision when changing circumstances compel courts to "renovate" outdated law and policy. See Felder v. Butler, 292 Md. 174, 182-83, 438 A.2d 494, 499 (1981); Adler, 291 Md. at 42-43 432 A.2d at 471 (recognizing tort of abusive or wrongful discharge); Condore v. Prince George's Co., 289 Md. 516, 530-31, 425 A.2d 1011, 1018 (1981)(asserting that the common law doctrine of necessities is subject to change not only via statute, but via judicial fiat if the courts believe the "common law rule is a vestige[***17] of the past, no longer suitable for the circumstances of our people"); Harris v. Jones, 281 Md. 560, 566, 380 A.2d 611, 614 (1977) (recognizing tort of intentional infliction of emotional distress); Deems v. Western Maryland Ry., Co., 247 Md. 95, 108-09, 231 A.2d 514, 522 (1967) (changing common law rule to make actions for loss of consortium available only jointly to husbands [*52] and wives as a legal entity); see also DEBORAH A. BALLAM, Employment-at-will: The impending death of a doctrine, 37 AM. BUS. L. J. 653, 656 (2000)(stating that "tort law, perhaps more than any other area of modern U.S. law, is the magic mirror reflecting the ways changes in society lead to changes in the law").

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

Courts must, however, use care in creating new public policy; in *Adler*, we quoted approvingly, the United States Supreme Court's conclusion that "public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or [**490] statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation [***18] may not, under changed conditions, be the public policy of another." *Adler*, 291 Md. at 46, 432 A.2d at 472 (quoting *Patton v. United States*, 281 U.S. 276, 306, 50 S. Ct. 253, 261, 74 L. Ed. 854, 867 (1930))(emphasis in original). In exercising our measured authority to define public policy, therefore, we must strive to confine the scope of public policy mandates to clear and articulable principles of law and to be precise about the contours of actionable public policy mandates.

The first limiting factor with respect to adopting a "new" public policy mandate for a wrongful discharge claim is derived from the generally accepted purpose behind recognizing the tort in the first place: to provide a remedy for an otherwise unremedied violation of public policy. See *Chappell v. Southern Maryland Hosp.*, 320 Md. 483, 493, 578 A.2d 766, 772 (1990)(finding it unnecessary to apply a tort remedy where the employee had other civil remedies available under both state and federal law); *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 626, 561 A.2d 179, 190 (1989). For example, in *Makovi*, supra, we held that the tort[***19] of wrongful discharge is inapplicable where the public policy sought to be vindicated - in that case, sex discrimination in the work place - is expressed in a statute which carries its own remedy for violation of that public policy. See *Makovi*, 316 Md. at 609, 561 A.2d at 182. We noted that Title VII of the Civil Rights Act of 1964, [*53] 42 U.S.C., §§ 2000e-2000e-17 (1982)("Title VII") and the Fair Employment Practices Act ("FEPA"), Maryland Code (1957, 1986 Rep. Vol.), Art. 49B §§ 14-18, set forth remedies for employees subject to unlawful sex discrimination. *Id.* at 623, 561 A.2d at 189. We therefore concluded that "the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation, does not apply. Further, allowing full tort damages to be claimed in the name of vindicating the statutory public policy goals upsets the balance between right and remedy struck by the Legislature in establishing the very policy relied upon." *Id.* at 626, 561 A.2d at 190. The Legislature had already defined the precise remedy for the "policy[***20] violation" of sex discrimination. Had we deemed the tort of wrongful discharge applicable to *Makovi*'s case, we would have expanded the available remedies for such violation beyond that which was articulated by the Legislature; namely, the remedies would include compensatory and punitive tort damages which were unavailable under the statute and would have "upset the balance between right and remedy struck by the Legislature in establishing the very policy relied upon." *Id.* Because the Legislature, upon considering the effect of violations of the policies they elected to promote, explicitly provided relief, it struck the appropriate balance "between right and remedy;" therefore, "provision by the courts of a further remedy goes beyond what the legislature itself thought was necessary to effectuate that public policy." *Id.* at 615, 561 A.2d at 185 (quoting *Lapinad v. Pacific Oldsmobile-GMC, Inc.*, 679 F. Supp. 991, 993 (D. Haw. 1988)). n6 Such expansion by the courts is inappropriate.

-----Footnotes-----

n6 We digress to recognize that while statutory remedies limit the applicability of the tort, the availability of contract remedies does not prevent the tort of wrongful discharge from applying. See *Ewing*, 312 Md. at 49, 537 A.2d at 1175.

-----End Footnotes-----

[***21]

A second limiting factor in defining a public policy mandate as a cause of action in tort is the notion that the policies should [**491] be reasonably discernible from prescribed constitutional or statutory mandates. See *Makovi*, 316 Md. at 622, 561 A.2d at 188 ("Judicial power to create a tort 'is to be exercised [*54] in the light of relevant policy determinations made by the [legislative branch].')(quoting *Bush v. Lucas*, 462 U.S. 367, 373, 103 S. Ct. 2404, 2409, 76 L. Ed. 2d 648, 654 (1983). While this Court has not confined itself strictly to prior judicial opinions, legislative enactments, or administrative regulations in determining the public policy of Maryland, we have, nevertheless, recognized that the establishment of "an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch." *Adler*, 291 Md. at 45, 432 A.2d at 472.

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

For example, in *Molesworth v. Brandon*, 341 Md. 621, 672 A.2d 608 (1996), a case in which we, again, reviewed the provisions[***22] of the Fair Employment Practices Act ("FEPA"), we held that Art. 49B provided a clear statement of public policy with respect to all employers who discriminated based on sex, despite the fact that Section 15(b) of FEPA explicitly exempted employers with fewer than fifteen employees from the administrative process of the Act. *Id.* at 628, 672 A.2d at 612. While such employers were exempted from the process under Section 15(b) of FEPA, they were not exempted from the policy articulated in Section 14, which, generally speaking, "assures all persons equal opportunity in receiving employment." n7 *Id.* The Legislature clearly articulated its policy with respect to equal opportunity in employment under FEPA; pursuant to this policy, we held that *Molesworth's* wrongful discharge cause of action was viable. *Id.* at 637, 672 A.2d at [*55] 616; see *Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467, 480-81, 486, 588 A.2d 760, 766, 769 (1991)(recognizing a wrongful discharge claim insofar as the discharge was motivated by the employee's lawsuit against a co-worker for sexual harassment (which amounted to assault and battery) because employees[***23] have a right to bring a civil action for sexual harassment and the "same clear public policy . . . makes tortious a discharge that retaliates against that recourse").

-----Footnotes-----

n7 Section 14 of Fair Employment Practices Act specifically provides,

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

Maryland Code (1994 Repl. Vol., 1995 Supp.) Art. 49B (emphasis added).

-----End Footnotes-----

[***24]

We have similarly concluded that a wrongful discharge cause of action based on a public policy violation existed when an employee was discharged solely because that employee filed a workers' compensation claim. See *Finch v. Holladay-Tyler Printing, Inc.*, 322 Md. 197, 202, 586 A.2d 1275, 1278 (1991); *Ewing*, 312 Md. at 50, 537 A.2d at 1175. The policy mandate, pursuant to Maryland Code (1957, 1985 Repl. Vol.), Article 101, Section 39A, explicitly prohibited discharging an employee for filing workers' compensation claims. n8 [**492] While Section 39A created a criminal cause for those employers who violate the mandate, we held a civil remedy to exist in the tort of wrongful discharge because of the clearly articulated policy mandate provided by the Legislature with respect to the filing of workers' compensation claims. *Finch*, 322 Md. at 202, 586 A.2d at 1278; *Ewing*, 312 Md. at 50, 537 A.2d at 1175.

-----Footnotes-----

n8 Article 101, Section 39A, in effect during the *Finch* case, was repealed in its entirety in 1996. See 1996 Md. Laws, ch. 10, § 15. The provision prohibiting the discharge of an employee for filing a workers compensation claim is now found in Section 9-1105 of the Labor and Employment Article.

-----End Footnotes-----

[***25]

Constitutional provisions and principles also provide clear public policy mandates, under which a termination may be grounds for a wrongful discharge claim. In *DeBleecker v. Montgomery County*, 292 Md. 498, 438 A.2d 1348 (1982), we held that the common law rule that an at-will public employee may be discharged at any time was inapplicable if the discharge [*56] was made as a result of an employee's exercise of his constitutionally protected First Amendment rights.

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

n9 Id. at 506, 438 A.2d at 1352-53. Similarly, our colleagues in the Court of Special Appeals recognized a public policy mandate based on a citizen's right to privacy in *Kessler v. Equity Management, Inc.*, 82 Md. App. 577, 572 A.2d 1144 (1990). *Kessler*, a rental agent for an apartment complex, was fired after she refused to enter the apartments of tenants whose rent was overdue to "snoop" through private papers in search of information regarding their place of employment, wages, etc. n10 Id. at 582, 572 A.2d at 1147. The intermediate appellate court held that there existed both statutory and constitutional protections against such invasions of privacy; as such, [***26] had *Kessler* carried out the instructions of her employer, she could have been subject to civil liability. See id. at 587, 572 A.2d at 1149; see also *Widgeon v. Eastern Shore Hosp. Ctr.*, 300 Md. 520, 529-30, 479 A.2d 921, 925-26 (1984) (explaining that Maryland recognizes a common law civil cause of action for conduct violative of state constitutional rights). Therefore, firing a person who refuses to commit an unlawful act - an act which violates another's constitutionally or statutorily protected legal rights - may contravene public policy. See *Kessler*, 82 Md. App. at 590, 572 A.2d at 1151; see also *Adler*, 291 Md. at 39-41, 432 A.2d at 469-70.

-----Footnotes-----

n9 The DeBleecker case was not presented on wrongful discharge grounds, but rather DeBleecker contested the employer's violations of his First Amendment rights, as evidenced by his (allegedly unlawful) termination.

n10 The Court of Special Appeals made a point of noting that the conduct in which *Kessler* was ordered to engage was much more grievous than mere trespass because *Kessler* was ordered to "rummage through the tenants' personal papers and effects to gather information that might be useful to the landlord." 82 Md. App. at 588, 572 A.2d at 1150.

-----End Footnotes-----

[***27]

C. Reporting of Co-worker's Suspected Criminal Activity - "Whistleblower" Protection

Discussing, as we have, our prior bases for defining a public policy mandate under which a wrongful discharge claim [*57] may be pursued is intended not only to provide a historical development of this tort, but also to help demonstrate long-standing prerequisites for recognition of a public policy exception to the at-will employment doctrine, and hence, the propriety of adopting a policy mandate similar to that which is sought by the petitioner today, but for which he is not eligible. We explain.

First, no statutory impediment to the tort cause of action sought by the petitioner exists because the Legislature, quite simply, has declined to provide a statutory remedy for private employee-whistleblowers. n11 [***493] Therefore, the purpose for recognizing the wrongful discharge tort - i.e. to provide a remedy for an otherwise unremedied violation of public policy - has maintained its vitality.

-----Footnotes-----

n11 We recognize that public employees of the executive branch are protected under Sections 5-301-313 of the State Personnel and Pensions Article for reporting, among other things, violations of laws, abuses of authority, and gross mismanagement of funds, which demonstrates the State's considerable interest in protecting the public from misconduct in government agencies. See Md. Code (1993, 1997 Repl. Vol.), § 5-305 of the State Personnel and Pensions Article. The Legislature has acted to protect private employee-whistleblowers from subsequent discharge in two circumstances: pursuant to Article 49B, Section 16(f) of the Maryland Code (1957, 1998 Repl. Vol.) (reporting discrimination practices) and Section 5-604(b) of the Labor and Employment Article (1991, 1999 Repl. Vol.) (reporting violations of the occupational safety and health regulations).

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

The General Assembly recently passed legislation which protects health care workers from retaliation for refusing to commit unlawful acts or reporting the commission of unlawful acts. See 2002 Md. Laws, ch. 504. Furthermore, the General Assembly added a provision to Section 5-307 of the State Personnel and Pensions Article which authorizes employees of the University of Maryland and Morgan State University to file grievances either under Section 5-309 or under Title 13 or 14 of the Education Article, respectively. See 2002 Md. Laws, ch. 118

-----End Footnotes-----

***28]

Second, and most significantly, an express statutory mandate provides a discernible foundation for the public policy exception sought by the petitioner; namely, the Legislature has created a misdemeanor offense for a person who harms or injures another's person or property in retaliation for reporting [*58] a crime. See Md. Code, Art. 27, § 762 (1957, 1996 Repl. Vol., 2001 Supp.). n12 Section 762 specifically provides:

(a) Prohibited acts. -- A person may not intentionally harm or injure any person or damage or destroy any property with the intent of retaliating against a victim or witness for giving testimony in an official proceeding or for reporting a crime or delinquent act.

(b) Penalty. -- A person who violates this section is guilty of a misdemeanor and upon conviction shall be sentenced to imprisonment for not more than 5 years.

A "witness" is defined as a person who:

- (1) Has knowledge of the existence of facts relating to a crime or delinquent act;
- (2) Makes a declaration under oath that is received as evidence for any purpose;
- (3) Has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional[*29] officer, or judicial officer; or
- (4) Has been served with a subpoena issued under the authority of a court of this State, of any other state, or of the United States.

See Md. Code(1957, 1996 Repl. Vol., 2001 Supp.), Art. 27, § 760(e).

-----Footnotes-----

n12 The Legislature recently added a new Criminal Law Article to the Maryland Code, whereby it repealed Article 27 of the Maryland Code and re-enacted the provisions under new statutory designations in the Criminal Law Article. See 2002 Md. Laws, ch. 26. The Act will take effect on October 1, 2002. Id. at § 16. The provisions relevant to the present case, i.e. Sections 760-764, will be re-enacted as Sections 9-301-304 of the Criminal Law Article, respectively.

-----End Footnotes-----

The particular definitions of witness which are germane to the prohibition in Section 762 are found in subsections (2) and (3) of Section 760(d): A witness who "makes a declaration under oath that is received as evidence for any purpose" pursuant to Section 760(d)(2) [*30] is a witness against whom retaliation is prohibited for [*494] "giving testimony in an official proceeding" pursuant to Section 762(a). A witness who [*59] "has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer" pursuant to Section 760(d)(3) is a witness against whom retaliation is prohibited for "reporting a crime or delinquent act." Md. Code, Art. 27, § 762(a). From these statutory provisions, a clearly definable public policy goal is derived: the Legislature sought to protect those witnesses who report suspected criminal activity to the appropriate law enforcement or judicial authority from being harmed for performing this important public task. From this clearly definable public policy, we are able to

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

adopt a civil cause of action in wrongful discharge for employees who are discharged for reporting suspected criminal activity to the appropriate authorities. n13

-----Footnotes-----

n13 The Arkansas Supreme Court similarly established public policy favoring employee-informants in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (Ark. 1988), where an employee was allegedly discharged because the employer believed he had reported the company to the General Services Administration for submitting false information. Id. at 381. The Arkansas Court, agreeing that "the public policy of a state is found in its constitution and statutes," based its public policy exception on a statute - markedly similar to Maryland's - which makes it a misdemeanor to retaliate against witnesses or informants. Id. at 385.

Of course, the protection afforded to those who report criminal activity would be eliminated should such report prove to be false, in accordance with Article 27 Section 150(a), which provides:

A person may not make a false statement, report or complaint, or cause a false statement, report or complaint to be made, to any peace or police officer of this State, of any county, city or other political subdivision of this State, or of the Maryland-National Capital Park and Planning Police knowing the same, or any material part thereof, to be false and with intent to deceive and with intent to cause an investigation or other action to be taken as a result thereof.

The Legislature's strong public interest in prohibiting false police reports, see *Choi v. State*, 316 Md. 529, 547, 560 A.2d 1108, 1116-1117 (1989)(stating that "in enacting this statute, the General Assembly intended to proscribe false reports of crimes and other statements which instigate totally unnecessary police investigations"), clearly supercedes any concern for retaliatory discharges that may ensue as a result of these false reports.

-----End Footnotes-----

[***31]

It appears, then, that the Legislature has created a cognizable statutory interest in the ability to report crimes or testify at an official proceeding without fear of retaliation in terms of [*60] personal or property damage. Similar to our decision in *Ewing*, supra, where we held that while Article 101, Section 39A created a criminal cause against those employers who discharge an employee for filing workers' compensation claims, the tort of wrongful discharge provides a civil remedy, see *Ewing*, 312 Md. at 49-50, 537 A.2d at 1174-75, we now conclude that while Section 762 creates a criminal cause against those who retaliate against witnesses who report crimes, the tort of wrongful discharge provides a civil remedy. n14 See *Makovi*, 316 Md. at 612, [**495] 561 A.2d at 183 (discussing [*61] this Court's holding in *Ewing* and noting that a criminal statutory sanction would not preclude the wrongful discharge tort). Thus, we hold that [HN6] terminating employment on the grounds that the employee (as a victim or witness) gave testimony at an official proceeding or reported a suspected crime to the appropriate law enforcement or judicial officer is wrongful[***32] and contrary to public policy.

-----Footnotes-----

n14 We explained in *Makovi v. Sherman Williams*, supra, and therein cited several jurisdictions which agreed, that when the statute, which evidences the public policy, itself provides a remedy for wrongful discharge, then a further remedy, at common law, is unnecessary. See generally *Makovi*, 316 Md. at 613-19, 561 A.2d at 184-87. This is because the "creation of a new common law action based on the public policy expressed in the statute would interfere with that remedial scheme," id. at 618, 561 A.2d at 186 (quoting *Melley v. Gillette Corp.*, 19 Mass. App. Ct. 511, 475 N.E.2d 1227, 1229 (Mass. App. Ct. 1985)), and more specifically because it would have upset "the balance between right and remedy struck by the Legislature in establishing the very policy relied upon." Id. at 626, 561 A.2d at 190.

Along those lines, we recognize that Article 27, Section 763 provides courts "with jurisdiction over a criminal matter" the authority "to stop or prevent the intimidation of a . . . witness or a violation of . . . § 762 of this subheading." Md. Code, Art. 27, § 763(b). The creation of a new common law action in this case, however, does not interfere with

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

any remedial scheme imposed by the Legislature, and thus is distinguishable from *Makovi*. Section 763 authorizes courts to provide injunctive relief in criminal matters by ordering that one party perform or desist from a particular act. The Legislature explicitly limited this injunctive authority to those courts "with jurisdiction over a criminal matter." Md. Code, Art. 27, § 763(b); see also 1993 Md. Laws, ch. 223 (explaining the purpose of the Act as "authorizing courts with criminal jurisdiction to issue certain orders to stop or prevent certain violations of law or the intimidation of a victim or witness"). Thus, if a court has jurisdiction in a criminal matter in which witnesses or victims are being retaliated against or intimidated, the court may issue an order to "stop or prevent the intimidation" or retaliation. The tort of wrongful discharge, on the other hand, also provides redress to an injured employee where the circumstances have not evolved into a "criminal matter."

That any remedy exists does not, itself, prohibit this Court from holding that a common law remedy may exist as well. While we must cautiously avoid both interference with a remedial scheme provided for by the Legislature and upsetting the balance between right and remedy as established by the Legislature, we shall not unduly limit the common law civil remedy where the Legislature only has explicitly provided for a limited remedy in criminal matters. We similarly noted that contract remedies did not prevent the tort of wrongful discharge from lying because "contract remedies ordinarily are intended to protect the expectation interest of the promisee . . . [and] are not intended to vindicate specific public policies." *Makovi*, 316 Md. at 612, 561 A.2d at 183 (discussing our decision in *Ewing v. Koppers Co.*, 312 Md. 45, 537 A.2d 1173 (1988), where we held that the availability of contract remedies to a contractual employee who was protected by a collective bargaining agreement did not prevent the tort of wrongful discharge from lying). Article 27 Section 763 does not provide any remedy for a wrongful retaliatory discharge rather it only grants courts with criminal jurisdiction the authority "to prevent intimidation of [a] victim or witness." Md. Code, Art. 27, § 763. The "remedy" provided in Section 763 does not vindicate the specific public policy illustrated in Section 762; thus, a tort remedy is appropriate in cases of wrongful discharge for those who report suspected criminal activity.

-----End Footnotes-----
[***33]

This conclusion is in line with our analysis in *Molesworth*, supra, in which the decisional issue was whether Section 14 of Article 49B provided a "sufficiently clear mandate of public policy" to support a common law wrongful discharge cause of action. See 341 Md. at 630, 672 A.2d at 613. We resolved to determine whether the specific term "employer" as used in Section 14, included those employers who were exempt by Section 15(b). In so doing, we used the plain language of the statute to discern the legislative intent, namely that any employer was prohibited from discriminating in employment decisions. *Id.* at 630-31, 672 A.2d at 613; see also *id.* at 632, 672 A.2d at 614 (stating that "where a public policy is as pervasive as Maryland's policy against sex discrimination, we presume the legislature does not intend to allow violations of that policy, absent some indication of a contrary intent"). Similarly, in the case sub judice, we use the plain language of [*62] Article 27, Section 762 to discern that the Legislature intended to preclude retaliation against [***34]those who report criminal activity.

That we so hold, however, does not mean that the petitioner has a successful [**496] claim for wrongful discharge. [HN7] To qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to the appropriate law enforcement or judicial official, not merely investigate suspected wrong-doing and discuss that investigation with co-employees or supervisors. n15 See *Faust v. Ryder* [*63] Comm. Leasing & Servs., 954 S.W.2d 383, 391 (Mo. Ct. App. 1997)(recognizing that a wrongful discharge claim may exist where there is a clear mandate of public policy and where the "'whistleblowing' actually occurred in that [the employee] reported the alleged criminal wrongdoing to the proper authorities")(emphasis added).

-----Footnotes-----

n15 The petitioner testified that he never notified law enforcement authorities about his suspicions regarding the store manager. The petitioner stated that had his suspicion risen to the level of probable cause, he would have been able to act under his own authority as a deputy sheriff; at no time during the investigation of the store manager, however, did he believe probable cause existed to arrest or formally accuse the store manager of theft, nor do we address his contention that he would have been able to act under his authority.

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

We acknowledge that some jurisdictions find the distinction between internal investigating and external reporting to be irrelevant. For example, in *Sullivan v. Massachusetts Mut. Life Ins. Co.*, 802 F. Supp. 716 (D. Conn. 1992), the federal court, in a prospective opinion concerning Massachusetts law, considered the internal whistleblowing claim of a former employee. *Id.* at 718. The employer contended that the plaintiff had not made a sufficient claim because the suspected violations were not reported to outside authorities, and the plaintiff never threatened to speak of the suspected violations to any authorities. *Id.* at 724. The court agreed with the plaintiff, finding that internal whistleblowing was sufficient and said:

This rule makes sense. A rule that would permit the employer to fire a whistleblower with impunity before the employee contacted the authorities would encourage employers promptly to discharge employees who bring complaints to their attention, and would give employees with complaints an incentive to bypass management and go directly to the authorities. This would deprive management of the opportunity to correct oversights straightaway, solve the problem by disciplining errant employees, or clear up a misunderstanding on the part of a whistleblower. The likely result of a contrary rule would be needless public investigations of matters best addressed internally in the first instance. Employers benefit from a system in which the employee reports suspected violations to the employer first; the employee should not, in any event, be penalized for bestowing that benefit on the employer.

Id. at 724-25. Whether the United States District Court for the District of Connecticut's hypothesis on how the requirement of external reporting may impact the internal employee reporting has any merit is inapposite. We refuse to create a public policy grounded only in mere supposition about the employer/employee relationship; the public policy mandates in this State must be based on some discernible principle of law as articulated by the Legislature or the courts.

-----End Footnotes-----
[***35]

In the limited times that the Legislature has enacted whistle-blower protection to protect private employees, the protection is only valid when the employee/whistle-blower reports the suspect activity externally. For example, Section 5-604(b) of the Labor and Employment Article protects an employee who files a complaint or brings an action for violations of the Occupational Safety and Health title by his or her employer. Maryland's anti-discrimination laws protect private employees who have opposed any unlawful discriminatory practice in which the employer engages, or reported or participated in an investigation or proceeding concerning the employer's discriminatory practices. See Md. Code, Art. 49B, § 16(f).ⁿ¹⁶ Similarly, with respect [**497] to Article 27, Section 762, the Legislature created a clear and unmistakable prohibition against retaliating against a person who reports criminal activity, externally, to the appropriate law enforcement authorities. We believe a corresponding common law cause of action must also require external reporting to the appropriate law enforcement authorities.

-----Footnotes-----

ⁿ¹⁶ Certain disclosures by public employees also must be to an external authority, namely the Attorney General. Sections 5-306 and 5-313 of the State Personnel and Pensions Article provide that disclosures that are otherwise prohibited by law must be made to the Attorney General in order for the protections guaranteed to all public employees by Section 5-305 to apply.

-----End Footnotes-----
[***36]

The petitioner argues that his employment as an Anne Arundel County Sheriff's Deputy should affect the duties and obligations he undertook as a security officer at [*64] Sears; i.e., he was not merely carrying out his duties as a security officer in investigating employee theft at Sears, but rather he also had a duty to investigate criminal acts as a sworn deputy with the Sheriff's Office. As the Court of Special Appeals correctly observed, however,

[The petitioner] conceded . . . that he was acting at all times relevant to his case as an employee of Sears, that his investigation of the store manager was outside of his duties as a sheriff's deputy, and that he never had probable cause to suspect that the store manager had committed a crime, so as to trigger his duties as a deputy sheriff. Therefore, any legal

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

duties that Wholey may have had in his role as a deputy sheriff were not implicated by his investigation of the store manager.

Wholey, 139 Md. App. at 662-63 n.7, 779 A.2d at 420 n.7. Granted, one may have a viable claim of wrongful discharge if terminated for acting pursuant to a legal duty when the employee's failure to perform that duty could result[***37] in potential liability. See *Thompson v. Memorial Hosp.*, 925 F. Supp. 400, 407-08 (D. Md. 1996)(finding that the legal duty to report the misadministration of radiation belonged to the hospital as the licensee under the regulation, COMAR 26.12.01.01, § D.409(b), and not the employee-physicist; therefore the employee could not claim protection from wrongful discharge under a public policy mandate); *Bleich v. Florence Crittenton Serv.*, 98 Md. App. 123, 138-40, 632 A.2d 463, 470-71 (1993)(recognizing a wrongful discharge claim for an educator terminated for filing a report for child abuse and neglect, as she was explicitly required to do by Maryland law, COMAR 07.02.23.01.A and COMAR 07.02.23.06D(1)(c)); see also *Shapiro v. Massengill*, 105 Md. App. 743, 768-69, 661 A.2d 202, 215, cert. denied, 341 Md. 28, 668 A.2d 36 (1995)(refusing to consider a claim of wrongful discharge "absent some clear mandate" or duty which the employee himself "actually could be held responsible" for breaching). The petitioner cannot point to any statute or regulation pertaining to his duties as either a Sears security officer or a deputy sheriff[***38] that would have held him [*65] accountable for failing to investigate or report the suspicious activity of the store manager.

We also shall consider the purpose of the petitioner's duties because such purpose, particularly as it relates to the general public, has also been a consideration in some jurisdictions. For example, the Connecticut Supreme Court, in *Sheets v. Teddy's Frozen Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), found a valid cause of action for wrongful discharge when an employee was fired for attempting to ensure that the employer's product complied with labeling and licensing laws of the state. As the "quality control director" of the company, the employee maintained responsibility for ensuring compliance with the regulations to which the company was bound under the Connecticut Uniform Drug and Cosmetic Act. *Id.* at 388. Therefore, the court stated [**498] that, "an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." *Id.* at 389. Contrary to the Connecticut case, the petitioner in the present case would not have risked criminal sanction for failing to pursue, on his employer's request, [***39] the continued investigation of the store manager. The reporting duties of the petitioner and Sheets are distinguishable. The petitioner was tasked with protecting the property of Sears from theft by customers and employees, and without question, in investigating the store manager, the petitioner was fulfilling the specific duties for which he was hired. The purpose of this duty, however, was to guard the private proprietary interests of Sears; Sheets, on the other hand, was responsible for ensuring compliance with a Connecticut regulation enacted to protect consumers, and thus the public, as a whole. Therefore, the petitioner cannot seek solace in the fact that his duties required him to investigate possible thefts.

Nor can the petitioner seek protection from an esoteric theory about acting in the "public good" by investigating criminal activity. The public good is best served by reporting suspected criminal activity to law enforcement authorities; an action which the petitioner, in this case, did not take. Granted, in order to report some suspected criminal activity a [*66] certain amount of marshaling of the facts may occur, but the mere recognition of a potential problem and [***40]gathering of information are not per se in the public interest. Furthermore, we decline to create a tort cause of action based solely on transcendental notions of that which is in the public interest, particularly when our own Legislature has declined to make individual citizens criminally responsible for failing to investigate or report criminal activity. In *Pope v. State*, 284 Md. 309, 352, 396 A.2d 1054, 1078 (1979), we noted:

If the Legislature finds it advisable that the people be obligated under peril of criminal penalty to disclose knowledge of criminal acts, it is, of course, free to create an offense to that end, within constitutional imitations, and, hopefully, with adequate safeguards.

To date, our Legislature has not so acted, except to protect those who do report criminal activity from retaliation. This Court now adopts a public policy mandate for employees who report criminal activity to the appropriate law enforcement authorities; we use caution, however, when considering a case on which the petitioner primarily relies, *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876, 52 Ill. Dec. 13 (Ill. 1981). The Illinois[***41] court in *Palmateer* held that the reporting of any type of crime is protected because the act of investigating and reporting criminal activity is, in and of itself, a public good. See *Palmateer*, 421 N.E.2d at 879-80. While the factual circumstances in *Palmateer* - an employee who was discharged after reporting to local law enforcement authorities that a fellow employee might be violating the criminal code - may appear to harmonize with our holding today, the means by which the Illinois

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

court arrived at this conclusion do not. The Palmateer court based its holding entirely on abstract notions of that which constitutes the public good. As the criticism extended by the dissent in Palmateer similarly alludes, such a policy mandate was unsupported by any legislative enactment and was grounded only in the obscure belief that public policy insists that all citizens become crime-fighters. See Palmateer, 52 Ill.Dec. 13, 421 [*67] N.E.2d at 884. The "ends" may be similar, but the "means" by which we achieve those ends are vastly different. [**499]

Our decision today is grounded in, and supported by, a legislative enactment from which a public policy mandate clearly emanates. [***42] We refuse to take the specific factual circumstance before us and induce from it an all-encompassing exception, as the petitioner would like, which declares that the act of investigating criminal activity is a per se public benefit, the termination for which, is actionable in tort law. Our legislature has declined to encroach upon the employment decisions of private companies through creation of a general all-encompassing "whistleblower protection" statute which would protect employees who investigate and internally report suspected criminal activity; we, in turn, decline to act in its stead. n17 See Adler, 291 Md. at 45, [**500] 432 A.2d at 472 (stating [*68] that "declaration of public policy is normally the function of the legislative branch" and thus concluding that while a cause of action may be recognized at common law, the basis for that cause of action must come from some clear mandate of public policy). The Legislature clearly intended, however, to preclude retaliation for the reporting of criminal activity by creating a criminal cause against those who violate the mandate. We similarly limit the public policy exception to those who report criminal activity[***43] to the appropriate authorities.

We digress momentarily to address concerns that our prior decision in Adler, supra, may appear to preclude the holding we adopt today. In Adler we neglected to find a cause of action for wrongful discharge when the employee reported [*69]illegal practices by management to his supervisors because "Adler failed to provide any factual details to support the general and conclusory averments . . . nor [did] he point to any specific statutory provision . . . that particularly prohibits the claimed misconduct." 291 Md. at 46, 432 A.2d at 472. The critical distinguishing factor between Adler and the case sub judice is at the time Adler was decided, the Legislature had not enacted the provision prohibiting retaliation against a witness for reporting a crime. Section 762, originally enacted as Section 768, see Md. Code (1957, 1992 Repl. Vol., 1993 Cum. Supp.), Art. 27, § 768, did not take effect until October of 1993. Id. Prior to the Acts of 1993, the Legislature had only prohibited intimidating, influencing or corrupting jurors or witnesses in the "discharge of his duty," i.e. as a juror deciding[***44] the outcome of a case or a witness giving testimony, see Md. Code (1957, 1992 Repl. Vol.), Art. 27, § 27, therefore, no public policy mandate regarding the reporting of criminal activity was discernible. n18

-----Footnotes-----

n17 Fewer than half (approximately 23) of the state jurisdictions have comprehensive whistleblower statutes which cover private employees as well as public employees. See e.g. ARIZ. REV. STAT. ANN. § 23-1501 (West 2001 Supp.); CAL. LAB. CODE § 98.6 (West 1989); CONN. GEN. STAT. § 31-105 (1997)(declares retaliation to be an unfair labor practice); CONN. GEN. STAT. § 31-51m (1997)(right of employee to bring civil action); HAW. REV. STAT. § 378-61-69 (1993 Repl. Vol.); KY. REV. STAT. ANN. § 337.990 (Michie 2001 Repl. Vol.); LA. REV. STAT. ANN. § 23:967 (West 1998); ME. REV. STAT. ANN. tit. 26, § 831-840 (West 1988); MICH. COMP. LAWS § 15.361-369 (1994); MINN. STAT. § 177.32 (1993); MONT. CODE ANN. § 39-2-904 (2001)(creating wrongful discharge claim, including for "retaliation . . . for reporting a violation of public policy"); NEB. REV. STAT. § 48-1227 (1998); N.H. REV. STAT. ANN. § 275:E1-E7 (1999 Repl. Vol.); N.J. STAT. ANN. § 34:19-1-9; (West 2000); N.Y. LABOR LAW § 740 (McKinney 2002 Supp.); N.D. CENT. CODE § 34-01-20 (2001 Supp.); OHIO REV. CODE ANN. § 4113.51-53 (Anderson 2001 Repl. Vol.)(all employees); OHIO REV. CODE ANN. § 4167.13 (Anderson 2001 Rep. Vol.)(state employees); OR. REV. STAT. ANN. § 659A.230 (2001); 43 PA. STAT. § 1421-28 (1991); S.D. CODIFIED LAWS § 28-1-45.7 (Michie 1992)(nursing home employees protected); TENN. CODE ANN. 50-1-304 (1999 Repl. Vol.); TEX. LAB. CODE ANN. § 21.055 (West 1996)(declaring retaliation against employees for reporting violation to be an unfair employment practice); VT. STAT. ANN. tit. XXI, § 232 (2001 Supp.)(creating private right of action for employees suffering retaliation); WIS. STAT. § 111.36 (1997)(declaring retaliation for reporting discrimination or harassment to be an unfair employment practice).

Meanwhile, most jurisdictions - including Maryland -- provide protection for state employees who report the wrongdoing of other state employees. See e.g. ALA. CODE § 36-25-24 (2001 Repl. Vol.) (reporting violations of ethics code

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

for public officials); ALASKA STAT. § 23.40.110 (Michie 2000)(reporting by state employees); ARIZ. REV. STAT. ANN. § 38-532 (West 2001)(whistleblowing by state employees); ARK. CODE ANN. § 8-7-1010 (Michie 2000 Repl. Vol.)(public employees chemical exposure right to know act); ARK. CODE ANN. § 11-10-106 (Michie 2000 Repl. Vol.)(protection for all employees who report false statements made by employers to state agency); COLO. REV. STAT. § 24-50.5-101-107 (2001)(reporting by state employees); FLA. STAT. Ch. § 112.3187 (2002 Supp.)(whistleblowing by state employees); IDAHO CODE § 6-2101 (1997)(whistleblowing by public employees protected); IND. CODE § 4-15-10-4 (1996)(public employees protected); IOWA CODE § 19A.19 (2001)(state personnel protected); KAN. STAT. ANN. § 75-2973 (1997)(protection for public employees who report violation to legislators); KY. REV. STAT. ANN. § 61.102 (Michie 1993)(public employees); ME. REV. STAT. ANN. tit.5 § 23 (West 2002)(state employees); MASS. GEN. LAWS ch. 150E § 10 (1999)(public employees); MISS. CODE ANN. § 25-9-171 et. seq (1999)(reporting to investigative or agency authorities); MO. REV. STAT. § 105.055 (2002 Supp.)(state employees); MONT. CODE ANN. § 39-31-401 (2001)(state employees); NEV. REV. STAT. ANN. § 288.270 (Michie 2002 Repl. Vol.)(government employees); NEV. REV. STAT. § 281.611 (Michie 2002)(defining reportable "improper governmental action"); N.C. GEN. STAT. § 126-17 (2001) and § 126-(84-88)(2001)(public protection for reporting improper government activities); OKLA. STAT. tit. 74 § 840-2.5 (2002)(public employees); R.I. GEN. LAWS § 28-50-(1-9)(2000)(public employees); S.C. CODE ANN. § 8-27-20 (West 2001 Supp.) (state employees); TEX. LOC. GOV'T CODE ANN. § 160.006 (West 1999)(municipal employees); UTAH CODE ANN. § 67-21-1 et. seq. (2000)(public employees reporting violations of state or federal law); WASH. REV. CODE § 42.40.010-.050 (1991, 1998 Supp.)(public employee whistleblower protection); WASH. REV. CODE § 42.41.010-.902 (2000)(local government employee whistleblower protection); W.VA. CODE § 6C-1-(1-8) (2000 Repl. Vol.)(public employees).
[***45]

n18 We also acknowledge the Fourth Circuit Court of Appeals's correct application of Maryland law with respect to the purported public policy mandate favoring investigation and reporting of criminal activity. After our answer of the certified question presented in *Adler*, and after trial in federal court, *Adler v. American Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982)(*Adler II*), the Fourth Circuit considered whether an employee's termination which was motivated by retaliation for his disclosure of wrongdoing to higher corporate officers violated Maryland public policy. *Adler v. American Standard Corp.*, 830 F.2d 1303, 1303-04 (4th Cir. 1987)(*Adler III*). The Fourth Circuit, employing our guidance from *Adler I*, properly determined that a discharge resulting from an employee's investigation of, or intention to "blow the whistle on," illegal activities was not in contravention to Maryland public policy because the employee was not performing a legal right or duty, nor was he refusing to engage in an illegal or wrongful activity. *Id.* at 1307.

Similarly, in *Milton v. IIT Research Inst.*, 138 F.3d 519 (4th Cir. 1998), the Fourth Circuit properly delineated the primary factors which define the scope of Maryland public policy mandates for wrongful discharge claims. Applying Maryland law, the Fourth Circuit explained that Maryland's public policy mandate generally only applies "where an employee has been fired for refusing to violate the law or the legal rights of a third party . . . [or] where [an] employee has been terminated for exercising a specific legal right or duty." *Id.* at 522 (internal quotations and citations omitted). Thus, in *Milton's* case, where he was discharged for informing management of the company's unlawful practices with respect to its use or abuse of tax-exempt status in its reports to the Internal Revenue Service, the Fourth Circuit refused to find a violation of Maryland public policy for "whistle-blowing," particularly when the employee had no legal duty to report the criminal activity. *Id.* at 521.

-----End Footnotes-----
[***46] [*70]

Again, while no legal duty to report criminal activity exists in Maryland, at least with respect to the factual circumstances [***501] before us, the Legislature has determined that one who reports criminal activity to appropriate authorities should be statutorily protected from retaliation for such conduct. Therefore, we conclude that a public policy mandate exists for employees who report criminal activity to the appropriate authorities and are subsequently discharged from employment on this basis. We decline the petitioner's invitation to adopt a broader public policy mandate for conduct encompassing the investigation of suspected criminal activity of an employee, being of the opinion that such a significant change in our law is best left to the Legislature. See *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 506 N.E.2d 919, 922, 923, 514 N.Y.S.2d 209 (N.Y. 1987)(refusing to recognize a tort cause of action for wrongful discharge

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

in violation of public policy for a whistleblower who reported illegal tax avoidance schemes to his supervisor, stating that "significant alteration of employment relationships . . . is best left to the Legislature . . . because stability and predictability[***47] in contractual affairs is a highly desirable jurisprudential value" and further noting that its Legislature had appropriately responded by enacting a myriad of statutes to protect at-will employees from terminations which run contrary to public policy)(citing *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983)). Furthermore, as the Supreme Court of California declared in *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (Cal. 1992):

A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public [*71] policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. And society's interests are served through a more stable job market, in which its most important policies are[***48] safeguarded.

Id. at 687-88 (emphasis added).

We believe that the proper balance is achieved by proceeding cautiously when called upon to declare public policy absent some legislative or judicial expression on the subject and in so doing, we limit the adoption of a tort cause of action for wrongful discharge to circumstances where an employee reports criminal activity to the proper authorities and is discharged as a result of this reporting. See *Ewing*, 312 Md. at 49, 537 A.2d at 1175 (explaining that the recognized tort action was not intended to reach every wrongful discharge, but rather only those where a clear mandate of public policy is violated).

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED WITH COSTS.

CONCURBY: Raker

CONCUR:

Concurring opinion by Raker, J.,
in which Wilner, J., joins

I join in the judgment of the plurality opinion affirming the judgment of the Court of Special Appeals. Unlike the plurality, I would affirm on the basis of the well-reasoned opinion of the Court of Special Appeals.

The plurality holds that "a clear public policy mandate exists in the State of Maryland which protects employees from a termination based[***49] upon the reporting of [**502] suspected criminal activities to the appropriate law enforcement authorities." See ante at 1. The case before us, however, involves an [*72] employee reporting to his supervisors, not to law enforcement officials. There is no clear public policy mandate that protects workers who report suspected crimes to their superiors. Therefore, I would not reach out to create a new exception to the at-will employment doctrine in a case not ripe for such decision. Inasmuch as the plaintiff herein has not stated facts to justify any exception to the at-will employment doctrine, this Court should not introduce expansive public policy dicta into the opinion. The Court pays lip service to the notion that we should proceed cautiously when called upon to declare public policy absent some legislative or judicial expression on the subject. See ante at 34. Nonetheless, the Court creates a tort cause of action in a case where the facts alleged by the plaintiff do not constitute a cause of action. See ante at 34.

Even if it were necessary to touch on the question addressed by the plurality, I would reach a different conclusion. This Court has recognized an exception to the at-will[***50] employment doctrine where the discharge of an employee violates a clear mandate of public policy. *Adler v. American Standard Co.*, 291 Md. 31, 40, 432 A.2d 464, 469 (1981). This exception, however, is a narrow one. Maryland courts have found a violation of a clear mandate of public policy only in limited circumstances: where an employee has been fired for refusing to violate the law or the legal rights of a third party, see *Kessler v. Equity Management, Inc.*, 82 Md. App. 577, 572 A.2d 1144 (1990) (holding that firing an at-will employee for refusing to commit the tort of invasion of privacy constitutes wrongful discharge), and where an employee has been terminated for exercising a specific legal right or duty. See *Watson v. Peoples Sec. Life Ins. Co.*, 322

370 Md. 38, *, 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

Md. 467, 588 A.2d 760 (1991) (holding that is contrary to a clear mandate of public policy for an employer to discharge an employee for seeking legal redress against a co-worker for sexual harassment); *Ewing v. Koppers Co.*, 312 Md. 45, 537 A.2d 1173 (1988) (holding that discharging an employee for filing a worker's compensation claim contravenes clear mandate of [***51] public policy); see also *Milton v. IIT Research Inst.*, 138 F.3d 519 (4th Cir. 1998); [*73] *Adler v. American Standard Co.*, 830 F.2d 1303 (4th Cir. 1987).

In the case sub judice, the Court of Special Appeals found that petitioner's claim did not fit under either of these categories, and that petitioner was therefore precluded from maintaining a cause of action for wrongful discharge. *Sears v. Wholey*, 139 Md. App. 642; 779 A.2d 408 (2001). I agree with this conclusion.

Even assuming that this Court would recognize an exception to the at-will employment doctrine in a case where an employee is required to report a crime to the authorities and is then discharged by an employer for doing so, the plurality has adopted a much broader exception. The plurality states that "courts must . . . use care in creating new public policy . . ." Ante at 11, 28 (holding that "this court now adopts a public policy mandate for employees who report criminal activity to the appropriate law enforcement authorities. . ."). Ironically, it is lack of caution or care that is the Achilles heel of the plurality opinion. In creating exceptions[***52] to the at-will employment doctrine, courts do not "create new public policy." Rather, we look to a clear mandate of public policy that necessitates the adoption of an exception to the at-will employment doctrine. See *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (1989). This Court should not be creating public policy to [**503] justify an exception to the at will employment doctrine. See *Magee v. O'Neill*, 19 S.C. 170, 185 (S.C. 1883) (stating that "the subjects in which the court undertakes to make the law by mere declaration of public policy should not be increased in number without the clearest reasons and the most pressing necessity."). This is particularly true in a case where, even if the tort did exist, the facts do not fit the tort.

The plurality's opinion is also out of synch with our precedent regarding wrongful discharge. We have stated that this Court is not confined to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this State. *Adler*, 291 Md. at 45, 432 A.2d at [*74] 472. Recognition of an otherwise undeclared public policy, however, involves "the application[***53] of a very nebulous concept to the facts of a given case." Id. Therefore, "absent a statute expressing a clear mandate of public policy, there ordinarily is no violation of public policy by an employer's discharging an at will employee." See *Molesworth v. Brandon*, 341 Md. 621, 630, 672 A.2d 608, 613 (1996) (quoting *Watson v. Peoples Ins. Co.*, 332 Md. 467, 588 A.2d 760 (1991)); *Felder v. Butler*, 292 Md. 174, 184, 438 A.2d 494, 499 (1981) (noting that "in determining the public policy of the State, courts consider, as a primary source, statutory or constitutional provisions.").

The plurality opinion points to Article 27, § 762 in an effort to find statutory support for its conclusion that there is a clear public policy mandate protecting employees who report suspected criminal activity to law enforcement officials. See ante at 18. That statute, however, does not place any duty upon an employee and is not an expression of clearly mandated public policy that would support the exception created today. Moreover, the plurality's reading of the statute expands the class of people protected under § 762, which[***54] only protects a "victim or witness" who gives testimony or reports a crime. n19 Under the plurality opinion, the protection of the statute applies to any employee who reports suspected criminal activity to the appropriate law enforcement officials, irrespective of whether there is a duty to report, or whether the employee was a testifying victim or witness.

-----Footnotes-----

n19 Section 762(a) reads as follows:

"A person may not intentionally harm or injure any person or damage or destroy any property with the intent of retaliating against a victim or witness for giving testimony in an official proceeding or for reporting a crime or delinquent act."

-----End Footnotes-----

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

Many courts have commented on dangers inherent in judicial involvement in the formation of public policy. Judge Levine, writing for Court in *Maryland-Nat'l Capital Park and Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 386 A.2d 1216 (1978), discussed the meaning of public policy as follows:

[*75] "Nearly 150 years ago Lord Truro set forth what has become [***55]the classical formulation of the public policy doctrine -- that to which we adhere in Maryland:

'Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.'

But beyond this relatively indeterminate description of the doctrine, jurists to this day have been unable to fashion a truly workable definition of public policy. Not being restricted to the conventional sources of positive law (constitutions, [**504] statutes and judicial decisions), judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity. Inevitably, conceptions of public policy tend to ebb and flow with the tides of public opinion, making it difficult for courts to apply the principle with any degree of certainty.

'Public policy . . . is but a shifting and variable notion appealed to only when no other argument is available, and which, if relied upon today, may [***56]be utterly repudiated tomorrow.'

Id. at 605-606, 386 A.2d at 1226 (citations omitted). Thus, in *Adler*, we stated:

"We have always been aware . . . that recognition or an otherwise undeclared public policy as a basis of a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch. We have been consistently reluctant, for example, to strike down voluntary contractual arrangements on public policy grounds."

Adler, 291 Md. at 45, 432 A.2d at 472 (citations omitted). See also *Milton*, 138 F.3d at 523 (noting that "this search for a specific legal duty is no mere formality. Rather it limits [*76] judicial forays into the wilderness of discerning 'public policy' without clear direction from a legislative or regulatory search.").

Accordingly, I would decide the case before us and leave for another day the consideration of whether there exists a clear mandate of public policy that would justify an exception in other circumstances.

Judge Wilner has authorized me to state that he joins in the views expressed [***57]herein.

DISSENTBY: Eldridge

DISSENT: Dissenting Opinion by Eldridge, J., in which

Bell, C.J., joins.

In my view, the decision today and Judge Battaglia's plurality opinion are inconsistent with this Court's holding in *Molesworth v. Brandon*, 341 Md. 621, 672 A.2d 608 (1996). In *Molesworth*, a former employee of a veterinarian brought a common law abusive discharge action against the veterinarian. The former employee claimed that her employment had been terminated because of her gender. This Court, in an opinion by Chief Judge Murphy, held that Maryland Code (1957, 1998 Repl. Vol.), Art. 49B, §§ 14 and 15, prohibiting employers from discriminating based on gender, provided "a sufficiently clear mandate of public policy to support *Molesworth's* common law wrongful discharge cause of action," even though the defendant veterinarian was not an employer within the meaning of the statutory provisions. *Molesworth v. Brandon*, supra, 341 Md. at 630-632, 672 A.2d at 613-614.

Similarly, the enactments by the General Assembly protecting various categories of "employee-whistleblowers," cited in the [***58] plurality opinion, furnish "a sufficiently clear mandate of public policy to support" the petitioner *Wholey's* cause of action.

370 Md. 38, *; 803 A.2d 482, **;
2002 Md. LEXIS 371, ***; 18 BNA IER CAS 1313

In addition, I continue to disagree with the extremely narrow scope which majorities of this Court have repeatedly accorded the tort of abusive discharge. This Court unanimously recognized the tort of "abusive discharge" in *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). [*77] Subsequently, however, the Court has so limited the tort action that numerous discharges from employment, which are abusive and clearly contrary to public policy as a matter of common sense, are held to be beyond the scope of the tort. It is illogical to recognize a tort action and [**505] then hold that virtually nothing falls within the action. See *Caldor v. Bowden*, 330 Md. 632, 677-678, 625 A.2d 959, 980-981 (1993) (Eldridge, J., joined by Bell, J., dissenting); *Watson v. Peoples Ins. Co.*, 322 Md. 467, 487-493, 588 A.2d 760, 770-772 (1991) (Eldridge, J., dissenting in part); *Chappell v. Southern Maryland Hospital*, 320 Md. 483, 498-503, 578 A.2d 766, 774-776 (1990) (Adkins, J., joined by Eldridge, J., and Cole, [***59] J., dissenting); *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 626-646, 561 A.2d 179, 190-200 (1989) (Adkins, J., joined by Eldridge, J., and Cole, J., dissenting). See also *Insignia v. Ashton*, 359 Md. 560, 574-575, 755 A.2d 1080, 1087-1088 (2000) (Eldridge, J., concurring).

Chief Judge Bell agrees with the views here expressed and joins this opinion.

WISCONSIN v. CONSTANTINEAU
No. 95

SUPREME COURT OF THE UNITED STATES

400 U.S. 433; 91 S. Ct. 507; 27 L. Ed. 2d 515; 1971 U.S.LEXIS 90

December 10, 1970, Argued
January 19, 1971, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

DISPOSITION: 302 F. Supp. 861, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee brought suit in the United States District Court for the Eastern District of Wisconsin seeking to have Wis. Stat. § 176.26 declared unconstitutional, and a divided three-judge panel held the act unconstitutional. The Supreme Court noted probable jurisdiction.

OVERVIEW: A chief of police, pursuant to Wis. Stat. § 176.26 and without notice or hearing to appellee, caused to be posted a notice in retail liquor outlets that sales or gifts of liquors to appellee were forbidden for one year. Suit was brought claiming damages and asking for injunctive relief, and the State of Wisconsin intervened as defendant on the injunctive phase of the case, with that the only issue tried and decided. A divided three-judge court held the law unconstitutional on its face and enjoined its enforcement. In affirming the decision, the Court held that where a person's good name, reputation, honor, or integrity was at stake because of government action, notice and an opportunity to be heard were essential. Even though the state courts had not ruled on the issue, abstention did not apply where there was no unresolved question of state law that only a state tribunal could authoritatively construe.

OUTCOME: The Supreme Court affirmed the finding that the statute was unconstitutional, ruling that the interest was such that the requirements of procedural due process must be met.

CORE TERMS: liquor, state law, notice, three-judge, beverage, abstention, posting, federal constitutional, federal district, state statute, intoxicating, village, fermented, gift, malt, Wisconsin Act, resident, stigma, forbid, label, federal jurisdiction, ambiguity, abstain, county superintendent, excessive drinking, district attorney, characterization, supervisors, illness, urgency

LexisNexis (TM) HEADNOTES - Core Concepts:

Constitutional Law: The Judiciary: Jurisdiction
[HN1] See 28 U.S.C.S. § 1343.

Constitutional Law: Procedural Due Process: Scope of Protection
[HN2] Where a state attaches "a badge of infamy" to a citizen, due process comes into play. The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to society.

Constitutional Law: Procedural Due Process: Scope of Protection

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

[HN3] Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Civil Procedure: State & Federal Interrelationships: Abstention

[HN4] The abstention rule only applies where the issue of state law is uncertain. Abstention cases deal with unresolved questions of state law which only a state tribunal could authoritatively construe.

Civil Procedure: State & Federal Interrelationships: Abstention

Constitutional Law: The Judiciary: Case or Controversy: Constitutionality of Legislation

[HN5] When the naked question, uncomplicated by an unresolved state law, is whether an act on its face is unconstitutional, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.

SUMMARY: A Wisconsin statute provided that various persons could forbid in writing the sale or gift of intoxicating liquors to one who, by excessive drinking, produced described conditions or exhibited specified traits, such as exposing himself or his family to want or becoming dangerous to the peace of the community. Pursuant to this statute, a police chief, without giving the appellee advance notice or an opportunity to be heard, caused to be posted in all local retail liquor outlets a notice forbidding sales or gifts of liquor to the appellee. Suing in the United States District Court for the Eastern District of Wisconsin, the appellee sought injunctive relief against the enforcement of the statute. A three-judge District Court granted injunctive relief, holding the statute violative of procedural due process because of the failure to provide notice of the intent to post and an opportunity to be heard (302 F Supp 861).

On appeal, the United States Supreme Court affirmed. In an opinion by Douglas, J., expressing the views of six members of the court, it was held (1) that the label or characterization given a person by posting the notice, though a mark of serious illness to some, was to others such a stigma or badge of disgrace that procedural due process required notice and an opportunity to be heard, and (2) that since there was no ambiguity in the state statute, the Federal District Court had acted properly in not abstaining from deciding the appellee's federal constitutional claim.

Burger, Ch. J., joined by Blackmun, J., dissented on the ground that on the basis of the policy of steering around head-on collisions with the states by avoiding unnecessary constitutional decisions, the Federal District Court should have abstained from deciding the appellee's federal constitutional claim until resort to state courts was exhausted.

Black, J., joined by Blackmun, J., dissented, expressing substantial agreement with Burger, Ch. J., and adding that the state courts might, without reaching constitutional questions, confine the state statute to its proper limits on the basis of state law provisions, and that it was unfair to deny the state courts such an opportunity.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

power of state --

Headnote:

A state has power to deal with the evils arising from a person's excessive drinking of intoxicating liquors.

[***HN2]

due process -- notice -- hearing --

Headnote:

Under a state statute authorizing various officials to have posted, in retail liquor outlets, notices naming persons to whom the sale of liquor is forbidden because of their prior excessive drinking, the label or characterization given a person by such posting, though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires such a person to be given notice and an opportunity to be heard before such posting occurs.

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

[***HN3]

due process --

Headnote:

The requirements of procedural due process are applicable where a state attaches a badge of infamy to a citizen.

[***HN4]

due process -- hearing --

Headnote:

The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

[***HN5]

due process -- notice -- hearing --

Headnote:

Notice and an opportunity to be heard are essential, on the basis of procedural due process, where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.

[***HN6]

abstention -- constitutionality of state statute --

Headnote:

There being no ambiguity in a state statute authorizing the posting of notices naming persons to whom the sale of liquor is forbidden because of their prior excessive drinking, a federal court should not abstain from deciding the federal constitutional claim that the statute violates procedural due process by failing to provide a person any notice or opportunity to be heard before such posting occurs.

[***HN7]

abstention doctrine --

Headnote:

The abstention rule authorizing federal courts to abstain from deciding questions involving state law applies only where an issue of state law is uncertain; abstention should not be ordered merely to await an attempt to vindicate a claim in a state court; and where there is no ambiguity in a state statute, a federal court should not abstain from deciding a claim that the statute violates the Federal Constitution.

SYLLABUS: The police chief of Hartford, Wisconsin, pursuant to a state statute, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquor to appellee, a resident of that city, were forbidden for one year. The statute provides for such "posting," without notice or hearing, with respect to any person who "by excessive drinking" produces certain conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. On appellee's suit seeking, inter alia, injunctive relief, a three-judge federal court held the statute unconstitutional as violative of procedural due process. Held:

1. The label or characterization given an individual by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. Pp. 436-437.

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

2. Since here the state statute is unambiguous and there is no uncertain issue of state law, the federal court properly proceeded to determine the federal constitutional claim. *Zwickler v. Koota*, 389 U.S. 241, 250-251. Pp. 437-439.

COUNSEL: Benjamin Southwick, Assistant Attorney General of Wisconsin, argued the cause for appellant. With him on the brief were Robert W. Warren, Attorney General, and Robert D. Martinson, Assistant Attorney General.

S. A. Schapiro argued the cause and filed a brief for appellee.

JUDGES: Douglas, J., delivered the opinion of the Court, in which Harlan, Brennan, Stewart, White, and Marshall, JJ., joined. Burger, C. J., filed a dissenting opinion, in which Blackmun, J., joined, post, p. 439. Black, J., filed a dissenting opinion, in which Blackmun, J., joined, post, p. 443.

OPINIONBY: DOUGLAS

OPINION: [*434] [***517] [**508] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee is an adult resident of Hartford, Wis. She brought suit in a federal district court in Wisconsin to have a Wisconsin statute declared unconstitutional. n1 A three-judge court was convened, 28 U. S. C. § 2281. That court, by a divided vote, held the Act unconstitutional, 302 F.Supp. 861, and we noted probable jurisdiction. 397 U.S. 985.

-----Footnotes-----

n1 [HN1] 28 U. S. C. § 1343 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

-----End Footnotes-----

The Act, Wis. Stat. § 176.26 (1967), provides that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who "by excessive drinking" produces described conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. n2

-----Footnotes-----

n2 Section 176.26 reads as follows:

"(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks, or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

Section 176.28 makes the sale or gift of liquor to such a person a misdemeanor.

-----End Footnotes-----

[*435] [**509] The chief of police of Hartford, without notice or hearing to appellee, caused to be posted a notice in all [***518] retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year. Thereupon this suit was brought against the chief of police claiming damages and asking for injunctive relief. The State of Wisconsin intervened as a defendant on the injunctive phase of the case and that was the only issue tried and decided, the three-judge court holding the Act unconstitutional on its face and enjoining its enforcement. The court said:

"In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within [*436]the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasijudicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter." 302 F.Supp., at 864.

[***HR1] We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. *Crane v. Campbell*, 245 U.S. 304. The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.

[***HR2A] [**510]

[***HR3] [***HR4] We reviewed in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, the nature of the various "private interest[s]" that have fallen on one side or the other of the line. See also *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-342. Generalizations are hazardous as some state and federal administrative procedures [***519] are summary [*437] by reason of necessity or history. Yet certainly [HN2] where the State attaches "a badge of infamy" to the citizen, due process comes into play. *Wieman v. Updegraff*, 344 U.S. 183, 191. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (Frankfurter, J., concurring).

[***HR2B] [***HR5] [HN3] Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

[***HR6] [***HR7] It is suggested that the three-judge court should have stayed its hand while the aggrieved person repaired to the state courts to obtain a construction of the Act or relief from it. The fact that Wisconsin does not raise the point does not, of course, mean that it lacks merit. Yet the suggestion is not in keeping with the precedents.

Congress could, of course, have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congressⁿ³ resolved differently and created the federal court system and in time granted the federal courts various heads of [*438] jurisdiction,ⁿ⁴ which today involve most federal constitutional rights. Once that jurisdiction was granted, the federal courts resolved those questions even when they were enmeshed with state law questions. In 1941 we gave vigor to the so-called abstention doctrine in *Railroad Commission v. Pullman Co.*, 312 U.S. 496. In that case an authoritative resolution of a knotty state law question might end the litigation and not give rise to any federal constitutional claim. *Id.*, at 501. We, therefore, directed the District Court to retain the suit pending a determination by a state court of the underlying state law question. We applied the abstention doctrine most recently in *Fornaris v. Ridge Tool Co.*, ante, p. 41, where a relatively new Puerto Rican statute, which had not been authoritatively construed by the Commonwealth's courts, "might be judicially confined to a more narrow ambit which would avoid all constitutional questions." We ordered the federal courts to stay their hands until the [***520] Puerto Rican [**511] courts had spoken. Speaking of *Reetz v. Bozanich*, 397 U.S. 82, we noted that the "three-judge federal court should not have proceeded to strike down an Alaska law which, if construed by the Alaska Supreme Court, might be so confined as not to have any constitutional infirmity." Ante, at 43. But [HN4] the abstention rule only applies where "the issue of state law is uncertain." *Harman v. Forssenius*, 380 U.S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. *Reetz v. Bozanich*, supra; *City* [*439] of *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639.

-----Footnotes-----

n3 The first Judiciary Act is in 1 Stat. 73.

n4 28 U. S. C. § 1343 (3) involved in the present case came into the statutes in 1871. 17 Stat. 13. In 1875 Congress enlarged federal jurisdiction by authorizing the "federal question" jurisdiction presently contained in 28 U. S. C. § 1331. See 18 Stat. 470. We recently reviewed this history in *Zwickler v. Koota*, 389 U.S. 241, 245-248.

-----End Footnotes-----

In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The Act on its face gives the chief of police the power to do what he did to the appellee. Hence [HN5] the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler v. Koota*, 389 U.S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. *Id.*, at 250-251. We would negate the history of the enlargement of the jurisdiction of the federal district courts, n5 if we held the federal court should stay its hand and not decide the question before the state courts decided it.

-----Footnotes-----

n5 See n. 4, supra.

-----End Footnotes-----

Affirmed.

DISSENTBY: BURGER; BLACK

DISSENT: MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court today strikes down, as unconstitutional, a Wisconsin statute that has never been challenged or tested in the Wisconsin state courts. The judges of Wisconsin probably will be taken by surprise by our summary action since few, if any, have ever heard of this case.

[*440] Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process.

The reason for my dissent is that it seems to me a very odd business to strike down a state statute, on the books for almost 40 years, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U.S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution, n1 but no [***521]one on either side of the case thought to discuss this or exhibit any interest in the subject. Since no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do, this case is, for me, a classic illustration of one in which we should decline to act until resort to state courts has been exhausted. At oral argument counsel for Mrs. Constantineau was candid in saying that he had deliberately avoided resort to the state courts because he could secure, and indeed did secure, a three-judge federal district court to decide [**512]the issue and, in that posture, appeal would lie directly to this Court.

-----Footnotes-----

n1 Although Wisconsin has no due process clause as such, Art. I, § 1, of the Wisconsin Constitution has been held by the Wisconsin Supreme Court to be substantially equivalent to the limitation on state action contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Pauly v. Keebler*, 175 Wis. 428, 185 N. W. 554 (1921).

-----End Footnotes-----

Only recently in the 1969 Term we held unanimously that a challenge, under the Equal Protection Clause of the Fourteenth Amendment and under certain provisions of the Alaska Constitution, to the constitutionality of a state statute restricting commercial salmon fishing licenses should not have been decided by the federal district court until the courts of Alaska had acted. There, [*441] as here, the statute's challenger wanted to use the "short cut" Congress has authorized. As here, the "short cut" was to convene a three-judge federal district court which held the Alaska statute invalid. Notwithstanding that the license applicants presented a sound claim, MR. JUSTICE DOUGLAS, speaking for a unanimous Court, said:

"We are advised that the provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court. The District Court, feeling sure of its grounds on the merits, held, however, that this was not a proper case for abstention, saying that 'if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable.' 297 F.Supp., at 304. The three-judge panel was a distinguished one, two being former Alaska lawyers. And they felt that prompt decision was necessary to avoid the 'grave and irreparable' injury to the 'economic livelihood' of the appellees which would result, if they could not engage in their occupation 'during this year's forthcoming fishing season.' Ibid.

400 U.S. 433, *, 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

"It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law, the classic case being *Meredith v. Winter Haven*, 320 U.S. 228, where federal jurisdiction was based on diversity only. Abstention certainly involves duplication of effort and expense and an attendant delay. See *England v. Louisiana State Board*, 375 U.S. 411. That is why we have said that this judicially created rule which stems from *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, should be applied only where 'the issue of state law is uncertain.' *Harman v. Forssenius*, 380 U.S. 528, 534." *Reetz v. Bozanich*, 397 U.S. 82, 86 (1970).

[*442] This very wise doctrine is an essential one of policy and is a keystone of federalism. Previously this Court had underscored this concept, saying:

"Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . [***522] In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-641 (1959).

See also *Fornaris v. Ridge Tool Co.*, ante, p. 41.

It is no answer to contend that there is no ambiguity in the Wisconsin statute and hence no need to abstain; in *Reetz* the Alaska statute could not have been more plain, or less susceptible of a limiting construction. Yet, in furtherance of this Court's firm policy to steer around head-on collisions with the States by avoiding unnecessary constitutional decisions, we reversed the District Court and remanded with instructions to stay its hand while the litigants exhausted state court remedies for resolution of [**513] their challenge to the statute. See also *Fornaris v. Ridge Tool Co.*, supra. *Reetz* cannot be distinguished and I see no reason to depart from the principles it reaffirmed. n2

-----Footnotes-----

n2 Here there is not the urgency presented by *Reetz* where our action in remanding for state court consideration effectively precluded appellees from securing a commercial fishing license for at least one more season. No such urgency is presented by the instant case.

-----End Footnotes-----

[*443] I quite agree that there is no absolute duty to abstain -- to stay our hand -- until the state courts have at least been asked to construe their own statute, but for me it is the negation of sound judicial administration -- and an unwarranted use of a limited judicial resource -- to impose this kind of case on a three-judge federal district court, and then, by direct appeal, on this Court. Indeed, in my view, a three-judge district court would be well advised in cases such as this, involving no urgency or question of large import, to decline to act.

This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve. Neither the historic role of this Court nor any reasonable duty placed on us, calls for our direct intervention when no reason for expedited review is shown. Here we have an example of an unwise statute making direct review *prima facie* available, and an unwillingness by the Court to follow its own precedents by declining to pass on the Wisconsin statute before Wisconsin courts do so. We should remand this case with directions to the three-judge court to refrain from acting until the Wisconsin courts have acted.

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, dissenting.

400 U.S. 433, *; 91 S. Ct. 507, **;
27 L. Ed. 2d 515, ***; 1971 U.S. LEXIS 90

I agree substantially with the dissent of THE CHIEF JUSTICE. I would vacate the District Court's judgment and remand with directions to withhold its proceedings to enable appellee to file a declaratory judgment or other state court action challenging the police chief's posting of notices in all Hartford retail liquor outlets forbidding sales or gifts of liquors to appellee for one year. As the [*444] Court's opinion, the cases there cited, and THE CHIEF JUSTICE's dissent point out, such a course of action [***523] is justified "where the issue of state law is uncertain" and where the state court might confine the state law's meaning so "as not to have any constitutional infirmity." The Wisconsin Act appears on its face to grant authority to a man's wife, a mayor, a town's supervisors, the county superintendent of the poor, a sheriff, or a district attorney to post notices forbidding liquor establishments from giving or selling any alcoholic beverages to the person so posted. The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common-law bill of attainder, against which our forebears had such an abhorrence that they forbade it in Art. I, § 9, of the Constitution. See, e. g., *United States v. Lovett*, 328 U.S. 303 (1946). And here the Wisconsin law purports on its face to place such arbitrary and tyrannical power in the hands of minor officers and others that these modern bills of attainder can be issued ex parte, without notice or hearing of any kind or character. It is impossible for me to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens. It seems to me therefore wholly uncertain that the state law has the meaning it purports to have, and I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries. For example, notice and hearing might be provided by principles of state administrative procedure law [**514] similar to the federal Administrative Procedure Act.

I realize that there are many cases where federal courts should not stay their hands to permit state courts to [*445] interpret state law. Compare *Clay v. Sun Insurance Office*, 363 U.S. 207, 213-227 (1960) (BLACK, J., dissenting), with *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Here, however, no state court appears to have passed on this Act at all, and a state decision might well apply the body of other state law to require notice, hearing, and other necessary provisions to render the challenged Act constitutional.

REFERENCES:

16 Am Jur 2d, Constitutional Law 560, 569; 20 Am Jur 2d, Courts 14; 32 Am Jur 2d, Federal Practice and Procedure 13; 45 Am Jur 2d, Intoxicating Liquors 266

US L Ed Digest, Constitutional Law 786, 803.5; Courts 757.5

ALR Digests, Constitutional Law 641; Courts 273.5

L Ed Index to Anno, Constitutional Law; Courts

ALR Quick Index, Due Process of Law; Federal Courts

Federal Quick Index, Abstention Doctrine; Due Process of Law

Annotation References:

Supreme Court's definition and application of doctrine of "abstention" where questions of state law are controlling in federal civil case. 20 L Ed 2d 1623.

Discretion of federal court to remit relevant state issues to state courts in which no action is pending. 94 L Ed 879, 3 L Ed 2d 1827; 8 ALR2d 1228.

Stay of action in federal court until determination of similar action pending in state court. 5 ALR Fed 10.